RICHARD B. O'KEEFFE, JR.
Captain, JAGC
Assistant Staff Judge Advocate

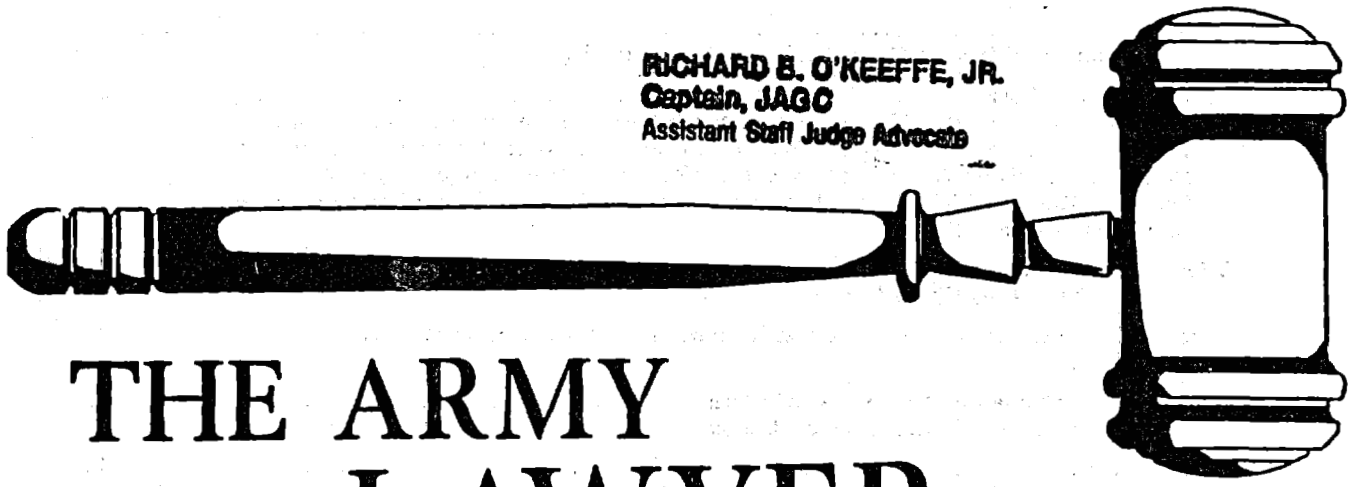

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Table of Contents

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Editor
Captain David R. Getz

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Thinking About Due Process

Major Richard D. Rosen
Instructor, Administrative & Civil Law Division, The Judge Advocate General's School

Introduction

As judge advocates, we spend a substantial part of our practice dealing with administrative process.[1] We review administrative actions—ranging from reports of survey to personnel separations—to ensure compliance with statutory and regulatory mandates. But, although administrative due process is part of our daily business, we devote little time to thinking about the constitutional underpinnings of our administrative procedures or to devising ways to limit the process the Army is obliged to furnish, or at least to reduce the likelihood of judicial review of that process.

Since 1972, the Supreme Court has applied a positivist approach to procedural due process.[2] The property and (to a lesser extent) liberty interests protected by the due process clause[3] are created by the positive law of the state. Property interests (and some liberty interests) do not spring from the Constitution or some "natural" law; instead, they are established and defined by nonconstitutional sources, such as statutes, regulations, and contracts.[4] Government, which the due process clause is supposed to restrain, decides in the first instance whether the restraints will apply.[5]

Under this positivist view of due process, our agency—the Army—has a great deal of discretion and flexibility in determining when and (to some extent) how much process should be afforded. As military attorneys, we can use this positivist approach to due process to minimize judicial imposition of procedural requirements on the Army and to insulate the Army's activities from court review.

While an article of this length cannot give exhaustive treatment to a subject as broad and complex as due process, I hope that it encourages judge advocates to think about the means by which they can narrow—when desirable—the Army's constitutional obligation to furnish due process.

The Desirability of Limiting Process and Judicial Review

In formulating a judge advocate's response to the positivist view of due process, I have made two assumptions: it is often in the Army's interest to limit the process it is obligated to provide; and it is always in the Army's interest to avoid judicial review of its activities.

First, the Army may often find it beneficial to limit the process it is obliged to provide. Process is expensive and time-consuming. It generally does not assist an agency to accomplish its mission, and to the extent it diverts agency resources, it inherently impedes the agency's performance of its business.[6]

The need to put limits on process is especially acute in the military. Civilian agencies have only limited influence on the lives of citizens, including their own employees. Especially with respect to its members, the military is much more intrusive. A fundamentally different relationship exists between government and members of the armed forces than between government and civilians. "[U]nlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one."[7] The opportunities for process are virtually limitless; they range from decisions concerning promotions and assignments to determinations regarding installation privileges.

Moreover, the mission of the military is unique. "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[8] Over-proceduralizing military determinations necessarily gives soldiers less time to accomplish this mission.

I do not mean to suggest, however, that all process is bad; it is not. Process can serve institutional goals of an agency, such as improving the public's perception of the agency.[9] It can also preserve the dignitary interests of those

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[1] In this article, I am concerned with procedural, as opposed to substantive, due process. Procedural due process imposes "constitutional limits on judicial, executive, and administrative *enforcement* of legislative or other governmental dictates." L. Tribe, American Constitutional Law 664 (2d ed. 1988) (emphasis in original). "Procedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person's life, liberty or property." It does not require that the rule being enforced be either "fair or just." 2 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law 12 (1986); *see also* Daniels v. Williams, 474 U.S. 327, 337–39 (1986) (Stevens, J., concurring).

Substantive due process, on the other hand, is concerned with the "constitutionality of the underlying rule [being enforced] rather than with the fairness of the process by which the government applies the rule to an individual." 2 R. Rotunda, J. Nowak & J. Young, *supra*, at 13; *see also* Daniels v. Williams, 474 U.S. 327, 331 (1986); L. Tribe, *supra*, at 664 n.4; Perry, *Substantive Due Process Revisited: Reflections On (and Beyond) Recent Cases*, 71 Nw. U.L. Rev. 417, 419 (1976).

[2] "The positivist view presupposes the existence of an independent legal rule as a prerequisite to any due process protection. To be procedurally protected an interest must be grounded in substantive legal relationships defined by explicit constitutional provisions or by specific state or federal rules of law." L. Tribe, *supra* note 1, at 677; *see also* Morgan, *The Constitutional Right to Know Why*, 17 Harv. C.R.-C.L. L. Rev. 297, 318 n.81 (1982) (" 'Positivism' . . . refers to a legal theory which recognizes interests as protected only if they are 'created' by federal or state law."); Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 457–58 (1986).

[3] The due process clause of the fifth amendment states: "No person shall be . . . deprived of life, liberty or property without due process of law." The fourteenth amendment also contains a due process clause, but it only applies to the states. *See* District of Columbia v. Carter, 409 U.S. 418, 424 (1973).

[4] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[5] *See* Comment, *From Goss to Bishop: The Demise of the Entitlement Doctrine*, 5 Pepperdine L. Rev. 523, 533 (1978).

[6] *See* Friendly, *"Some Kind of Hearing"*, 123 U. Pa. L. Rev. 1267, 1276 (1975); Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 Calif. L. Rev. 146, 157–71 (1983).

[7] Parker v. Levy, 417 U.S. 733, 751 (1974).

[8] United States *el rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

[9] Morgan, *supra* note 2, at 307–10. Importantly, an agency can gratuitously afford individuals process without necessarily providing them a protected due process interest. *See infra* notes 51, 58, 71, and accompanying text.

adversely affected by agency actions.[10] Even in the absence of protected interests, the Army recognizes a need for process in a wide-range of determinations.[11] Less process, however, is sometimes better. At the very least, given the disadvantages of over-proceduralizing administrative decision-making, an agency attorney has the duty to advise his or her client about when and how it can eliminate the need for process.

Second, it is always in the Army's interest to avoid judicial review of its activities.[12] Like administrative process, litigation is expensive, time-consuming, and contributes nothing to an agency's accomplishment of its mission. Moreover, unlike agency-provided process, litigation does not serve institutional or dignitary goals. And judicial review can potentially lead to court interference with the agency itself, resulting in judicially-caused delay or obstruction of agency actions.

Limiting the opportunities for judicial review of administrative actions applies with special force in the military. The Constitution entrusts the political branches of the government, not the courts, with superintendence and control over the military.[13] Moreover, courts generally lack the competence and expertise necessary to evaluate military decisions.[14] The courts are reluctant to intervene in military affairs because they "are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[15]

Under the Administrative Procedure Act, Congress has insulated military decisions from judicial review both explicitly[16] and by broad, plenary grant of statutory discretion to military decisionmakers.[17] The courts themselves have recognized the sensitivity of military decisions and have created their own deferential standards to determine whether such decisions should be reviewed.[18]

Consequently, agency attorneys, especially military counsel, serve their clients well if they are able to limit the occasions for judicial review of their agency's activities. And limiting administrative process and reducing the opportunities for judicial review are interrelated. If an agency can constitutionally circumscribe the process it affords by not creating protected interests, the agency removes from judicial scrutiny the adequacy of its procedures.

Development of the Positivist Approach

The Creation of Protected Interests

For the first half of the 20th century, the "right-privilege" distinction governed due process protection for government largesse or entitlements. Under this distinction, the courts viewed government entitlements, like public employment, as unprotected privileges rather than constitutionally-protected rights, and they permitted the state to terminate an individual's receipt of the entitlements for any reason or no reason. Of course, no right of procedural due process accompanied the loss.[19]

The "right-privilege" distinction eroded over the years; the Supreme Court last applied it in 1951.[20] With the demise of the distinction, and until 1972, the courts generally considered the initial applicability of the due process clause and the extent of process due as one issue: the form of the right to due process depended upon the weight of the interest involved.[21] "The phrase 'life, liberty or property' was read as a unit,"[22] and what process was due was contingent upon how seriously the state had harmed the individual.[23]

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[10] Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. Rev. 885 (1981); Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in Due Process: Nomos XVIII 172 (J. Pennock & J. Chapman eds. 1977); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. Pa. L. Rev. 111 (1978).

[11] For example, the Army requires rudimentary due process before commanders can place adverse information—such as letters of reprimand—in personnel files. Dep't of Army, Reg. No. 600-37, Personnel—General—Unfavorable Information, ch. 3 (19 Dec. 1986). Because the information contained in personnel files is confidential and unlikely to be disseminated outside the Army, no process is constitutionally due. *See* Sims v. Fox, 505 F.2d 857 (5th Cir. 1974) (en banc), *cert. denied*, 421 U.S. 1011 (1975).

[12] *See* Simon, *supra* note 6, at 157–71. *See generally* Rabin, *Job Security & Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. Chi. L. Rev. 60, 84–85 (1976).

[13] U.S. Const. art. I, § 8, cls. 13–15; art. II, § 2, cl. 1; *see also* Goldman v. Weinberger, 475 U.S. 503 (1986); Chappell v. Wallace, 462 U.S. 296, 301 (1983); Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975); Gilligan v. Morgan, 413 U.S. 1, 6–8 (1973); Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

[14] Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[15] Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962).

[16] 5 U.S.C. § 701(b)(1) (1982) (courts-martial and military authority exercised in the field in time of war or in occupied territory is not subject to judicial review under the APA).

[17] *See, e.g.*, 10 U.S.C. § 3012(g) (1982) (giving Secretary of the Army authority to make regulations governing the Army). *See generally* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1972); Ornato v. Hoffman, 546 F.2d 10, 14 (2d Cir. 1976).

[18] *See, e.g.*, Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1970).

[19] *See e.g.*, McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517–18 (1892) (Holmes, J.). *See generally* 2 J. Nowak, R. Rotunda & J. Young, *supra* note 1, at 202; Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445, 445–52 (1977) [hereinafter Van Alstyne, *Cracks in "The New Property"*]; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968); *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1756 (1984).

[20] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by equally-divided court*, 341 U.S. 918 (1951); *see also* 2 J. Nowak, R. Rotunda & J. Young, *supra* note 1, at 202–04.

[21] *See* L. Tribe, *supra* note 1, at 678–79; Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 Sup. Ct. Rev. 261, 261–62; Note, *Specifying the Process Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510, 1511–12 (1975) [hereinafter Note, *Specifying the Procedures Required by Due Process*].

[22] J. Ely, Democracy and Distrust 19 (1980).

[23] *Id.*; *see also* Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 409 (1977); Saphire, *supra* note 10, at 126.

Simply put, "notice and a hearing had to be accorded prior to any grievous government deprivation."[24]

In 1972, with its decisions in *Board of Regents v. Roth*[25] and *Perry v. Sindermann*,[26] the Supreme Court shifted focus in due process cases. No longer would individuals be entitled to notice and a hearing simply because the government injured them in some way; instead, they would have to show that the government deprived them of some legally-cognizable interest in their "life, liberty, or property."[27] The Court thus added a definitional prerequisite to due process, formulating a two-step analysis for deciding due process cases: courts must find a protected interest in life,[28] liberty, or property that has been implicated by state action; and, only if they find such an interest, courts must then assess the adequacy of the process used to withhold or terminate the interest.[29]

The definitional predicate in due process cases entails a positivist view of property, and to a lesser extent, liberty. Property (and some liberty) interests originate in state law or contract; they are not "freestanding" human rights.[30]

> To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law—rules of understandings that secure benefits and that support claims of entitlement to those benefits.[31]

While many commentators have been highly critical of the Court's positivist view of due process,[32] the Court has shown little inclination to alter the course it has set in due process analysis.[33]

Determining What Process Is Due

If the state, through its positive law, creates a protected interest in property or liberty, it not only incurs a constitutional duty to provide process before infringing on the interest, but it also opens the adequacy of its process to judicial review. Once the substantive law of the state establishes a protected interest, the federal courts determine what process is sufficient to terminate the interest. As will be discussed below, the state neither acquires an obligation to provide process nor invites such judicial intervention into its administrative procedures if it simply affords gratuitous process for an unprotected interest.

A major issue spawned by the Supreme Court's positivist approach to due process was whether the judiciary was obliged to accept legislatively-prescribed procedures that accompanied the grant of property or liberty interests. In other words, if a state, by statute or regulation, affords individuals a property interest in a benefit and, at the same time, provides a procedure through which the benefit may be forfeited, is the procedure provided constitutionally adequate as a matter of law? The potential ramifications of such an approach are readily apparent; legislatures and executive agencies could, by including procedural provisions with substantive grants of benefits, make due process, at least with respect to government entitlements, virtually immune from judicial review.[34] For a while, it appeared that the Supreme Court might adopt such an approach; however, it never obtained a majority and was ultimately repudiated by most of the Justices.

Justice Rehnquist's plurality decision in *Arnett v. Kennedy*[35] gave birth to the concept. Kennedy was a nonprobationary federal civil service employee who was fired for publicly accusing his supervisor of taking a bribe. Under the applicable civil service statute, Kennedy's pretermination rights were confined to an informal hearing before the

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[24] L. Tribe, *supra* note 1, at 679; *see, e.g.*, Joint Anti-Facist Comm. v. McGrath, 341 U.S. 123, 161–62 (1951) (Frankfurter, J., concurring).

[25] 408 U.S. 564 (1972).

[26] 408 U.S. 593 (1972).

[27] J. Ely, *supra* note 22, at 19; G. Gunther, Constitutional Law 568 (11th ed. 1985); Monaghan, *supra* note 23, at 409; Van Alstyne, *Cracks in "The New Property"*, *supra* note 19, at 451–52. Some commentators have suggested that the threshold requirement of establishing a liberty or a property interest before courts will require due process protection harkens a return to the old "right-privilege" distinction. *See, e.g.*, 2 J. Nowak, R. Rotunda & J. Young, *supra* note 1, at 204–05; Herman, *The New Liberty: The Procedural Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. Rev. 482, 488 n.16 (1984); Smolla, *The Re-emergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 Duke L.J. 89, 98–99. This view is not without its critics. *See* Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 Geo. L.J. 861, 886–98 (1982).

[28] A person's life is rarely, if ever, threatened by administrative actions. Monaghan, *supra* note 23, at 410–11 n.37.

[29] Tushnet, *supra* note 21, at 262; Note, *Specifying the Procedures Required by Due Process*, *supra* note 21, at 1510. The Supreme Court may have added a third step to the due process analysis: the need to determine whether governmental infringement of a protected interest amounts to a deprivation of constitutional dimensions. *See* Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986) (negligent deprivations of protected interests do not trigger right to due process).

[30] Van Alstyne, *Cracks in "The New Property"*, *supra* note 19, at 454.

[31] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[32] Commentators have proposed a number of alternatives to the positivist approach, which would all somehow "constitutionalize" the interests protected by the due process clause. *See, e.g.*, J. Ely, *supra* note 22, at 19; L. Tribe, *supra* note 1, at 666–70; Grey, *Procedural Fairness and Substantive Rights*, in Due Process: Nomos XVIII 182 (J. Pennock & J. Chapman eds. 1977); Mashaw, *supra* note 10; Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1103 (1981); Michelman, *Formal & Associational Aims in Procedural Due Process*, in Due Process: Nomos XVIII 126 (J. Pennock & J. Chapman eds. 1977); Monaghan, *supra* note 23, at 409; Morgan, *supra* note 2; Rabin, *supra* note 12; Smolla, *supra* note 27, at 120; Terrell, *supra* note 27, at 545–46.

[33] Mashaw, *supra* note 10, at 887.

[34] Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 Tex. L. Rev. 875 (1982).

[35] 416 U.S. 134 (1974).

very supervisor against whom he had lodged the allegations.[36] Kennedy sued, claiming that he had been denied sufficient process before being terminated.

Justice Rehnquist, writing for himself, Chief Justice Burger, and the late Justice Stewart, rejected Kennedy's claim. In Rehnquist's view, Kennedy was only entitled to the process that came with the statute that gave Kennedy the property interest in his job:

> Here [Kennedy] did have a statutory expectancy that he would not be removed other than for "such cause as will promote the efficiency of the service." But the very section of the statute which granted him that right . . . expressly provided also for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which [Kennedy] insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon [Kennedy] the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitation Congress attached to it. . . .
>
> . . . .
>
> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant must take the bitter with the sweet.[37]

Six Justices rejected Justice Rehnquist's analysis. In their view, once the government provides a protected interest, the federal courts must determine the nature of the process that is constitutionally due.[38] Rehnquist's position was also the subject of intense criticism in the academic community.[39]

Had Rehnquist's view drawn a majority, the implications for agency counsel seeking to limit their agency's constitutional obligation to provide process are obvious. Simply by inserting some procedural protections into statutes or regulations granting protected interests, agencies could avoid any judicial review of the adequacy of their process. Alas (or fortunately, depending upon one's point of view), the Court never adopted Rehnquist's position.

In both *Vitek v. Jones*[40] and *Logan v. Zimmerman Brush Co.*,[41] the Court refused to follow Rehnquist's view, holding that the adequacy of process was a matter of federal law. Then, in *Cleveland Board of Education v. Loudermill*,[42] the Court, in very clear terms, repudiated Rehnquist's position:

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee [of due process]. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a tautology. . . . The right to due process "is conferred, not by legislative grace, but by a constitutional guarantee. While the legislature may elect not to confer a property interest . . . , it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." . . .
>
> In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." . . . The answer to that question is not to be found in the [state] statute.[43]

Thus, under the Court's positivist view of due process, the state may create substantive interests in property and liberty but, once created, the courts, not the legislatures or executive agencies, determine what process is due. Simply put, once the Army creates a property or liberty interest, it not only incurs the burden of mandatory process, but also invites judicial examination of the adequacy of its procedures.

Limiting Mandatory Process and Judicial Review

Substantive Limits on Official Discretion

Under the Court's positivist approach to due process, agencies can ensure that individuals adversely affected by agency actions are not afforded interests protected by the due process clause. Absent the implication of such interests, the agency is not constitutionally bound to provide process and the potential for judicial intrusion into administrative decision-making is diminished substantially.

The most direct means by which an agency can avoid mandatory procedural requirements is to avoid creating the property or liberty interests that trigger due process. As noted above, positivism starts with the proposition that only interests created by some enacted law are protected by the due process clause. Interests are not created by the Constitution or by some other source, such as "natural" law. But while the executive and legislative branches can enact "any rules to describe the contours of a potential entitlement, *courts* still retain[ ] the power to decide whether the configuration of rules [rises] to the level of [an] interest for purposes of the due process clause."[44] Thus, aside from potential political pressures, the primary hurdle an agency must negotiate in avoiding protected rights is careful draftsmanship.

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[36] *Id.* at 196–97 (White, J., concurring in part and dissenting in part).

[37] *Id.* at 151, 153–54.

[38] *See id.* at 164–67 (Powell, J., concurring in part); 171, 184–86 (White, J., concurring and dissenting); 206, 207–11 (Marshall, J., dissenting).

[39] The academician's response is described in Laycock, *supra* note 34. Not all commentators, however, were critical. *See* Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85.

[40] 445 U.S. 480 (1980).

[41] 455 U.S. 422 (1982).

[42] 470 U.S. 532 (1985).

[43] *Id.* at 541.

[44] Terrell, *supra* note 27, at 886 (emphasis in original).

With regard to property interests, the Supreme Court "appears committed to the view that there is no constitutional content to 'property' other than that derived from state (or federal) law, or from the explicit understandings between the state and the individual."[45] The critical issue is what type of statutory, regulatory, or contractual language or what type of understanding is necessary to create (or to avoid) a property interest.

Supreme Court decisions provide some guidance. In *Board of Regents v. Roth,*[46] the Court held that a state's failure to renew an employment relationship does not implicate property interests absent a law that confers such a right. The Court found in *Perry v. Sindermann*[47] that a property interest might arise from an implied contract; that is, "mutually explicit understandings that support [the individual's] claim of entitlement to the benefit."[48] It is clear, however, from the Court's per curiam decision in *Leis v. Flynt,*[49] that a longstanding practice alone will not support such a claim of property. And in *Bishop v. Wood,*[50] the Court held that even employees designated permanent have no property interest in their jobs if state law is construed to make their employment terminable-at-will. Furthermore, the fact that state law may offer some process does not, by itself, create a protected interest.[51]

From these decisions, and opinions of the lower federal courts, one can discern at least the contours of property interests in government entitlements. Absent a contract, if statutes or regulations say *nothing* about an individual's entitlement, no property interest exists.[52] For example, no statutes or regulations speak to an individual's right to join the military; consequently, no property interest exists that might require notice and a hearing before an individual is denied enlistment in the armed forces.[53]

Moreover, the statutory or regulatory language necessary to create a property interest must do more than simply place labels (such as "permanent employment") on the desired entitlement.[54] Instead, the statutes or regulations must impose—implicitly or explicitly—substantive limits on the discretion to withhold or terminate the benefit. Statutes or regulations that condition loss of an entitlement on "cause" or that enumerate the substantive bases that must exist before the entitlement can be withheld or withdrawn create property interests protected by the due process clause.[55] Conversely, statutes or regulations that refer to benefits, such as public employment, as "probationary" or "terminable-at-will,"[56] or that provide that receipt of the benefit is at the discretion of some public official,[57] do not create property interests.

Importantly, simply because a statute or regulation may afford some process before termination of a benefit does not give an individual a constitutionally-protected interest in the benefit. The statute or regulation must independently create the substantive interest by limiting governmental discretion.[58]

Like property, liberty may also be established by the positive law of the state.[59] Over the past decade, in a number of cases dealing with the procedural rights of prisoners, the Supreme Court has applied a positivist approach to liberty. Specifically, where the government creates an expectation in liberty, such as parole, "good-time" credits, and prison discipline, and imposes particularized standards or criteria to guide its decisionmakers, it establishes a constitutionally-protected interest in liberty.[60] While the Court has confined the positivist concept of liberty to prisons, its approach has implications beyond prison walls.[61]

As a general rule, once persons are sent to prison, the state can confine them and subject them to the rules of the

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[45] Herman, *supra* note 27, at 497.

[46] 408 U.S. 564 (1972).

[47] 408 U.S. 593 (1972).

[48] *Id.* at 601.

[49] 438 U.S. 438 (1977).

[50] 426 U.S. 321 (1976).

[51] *Id.* at 347; *see also* Stow v. Cochran, 819 F.2d 864 (8th Cir. 1987); *accord* Olim v. Wakinekona, 461 U.S. 238 (1983).

[52] Board of Regents v. Roth, 408 U.S. 564 (1972).

[53] *See generally* Mack v. Rumsfeld, 783 F.2d 1024 (2d Cir.), *cert. denied,* 107 S. Ct. 71 (1986); Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981).

[54] Bishop v. Wood, 426 U.S. 341 (1976).

[55] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Merritt v. Mackey, 827 F.2d 1368, 1371 (9th Cir. 1987); RR Village Ass'n, Inc. v. Denver Sewer Corp., 826 F.2d 1197, 1201 (2d Cir. 1987); Jungels v. Pierce, 825 F.2d 1127, 1130 (7th Cir. 1987); Hatcher v. Board of Public Educ., 809 F.2d 1546, 1550–52 (11th Cir. 1987).

[56] Fontano v. City of Chicago, 820 F.2d 213 (7th Cir. 1987); Robinson v. City of Montgomery City, 809 F.2d 1355 (8th Cir. 1987); Thomason v. McDaniel, 793 F.2d 1247 (11th Cir. 1986); Lee v. Western Reserve Psychiatric Rehabilitation Center, 747 F.2d 1062 (6th Cir. 1984); Swift v. United States, 649 F. Supp. 596 (D.D.C. 1986).

[57] Cunningham v. Adams, 808 F.2d 815 (11th Cir. 1987); Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986); Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984).

[58] Bishop v. Wood, 426 U.S. 341 (1976); Stow v. Cochran, 819 F.2d 864 (8th Cir. 1987). Federal agencies must, however, follow prescribed statutory and regulatory procedures whether or not the procedures are constitutionally required. *See* Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1954); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); VanderMolen v. Stetson, 571 F.2d 617 (D.C. Cir. 1977). *See generally* O'Roark, *Perspective: Military Administrative Due Process of Law as Taught by the* Maxfield *Litigation,* 72 Mil. L. Rev. 137, 139–42 (1976).

[59] As a general rule, liberty interests are not dependent upon the positive law of the state; rather, they flow directly from the Constitution. *See, e.g.,* Herman, *supra* note 27, at 502; Michelman, *Formal and Associational Aims in Procedural Due Process, supra* note 32, at 132. Thus, freedom from physical confinement or freedom to engage in a particular (otherwise lawful) occupation do not depend upon positive state enactments. *See generally* 2 R. Rotunda, J. Nowak & J. Young, *supra* note 1, at 212–32.

[60] Herman, *supra* note 27, at 502.

[61] *See, e.g.,* Velasco-Gutierrez v. Crossland, 732 F.2d 792 (10th Cir. 1984) (immigration case); Metlin v. Palastra, 729 F.2d 353 (5th Cir. 1984) (off-limits determination).

prison so long as the conditions of confinement are within the prisoner's sentence and do not otherwise violate the Constitution.[62] Prisoners have received their process at their criminal trials.[63] Thus, for example, they can be moved form one prison to another without additional process, even though the move may worsen the conditions of confinement.[64]

A state may, however, create liberty interests by its positive law if it imposes substantive standards to guide the discretion of prison administrators. For example, in *Hewitt v. Helms,*[65] state prison officials in Pennsylvania placed an inmate in administrative segregation following a prison riot. The prisoner did not receive a hearing. The state, by statute and regulation, placed limits on the discretion of prison administrators to use administrative segregation, restricting segregation to such occasions as when the inmate posed a threat to security.[66] The Court held that, while process is normally not required before a prisoner is placed in administrative segregation,[67] because the state imposed substantive predicates on the exercise of official discretion, the prison administrators had to provide process to determine whether the predicates had been met.[68]

Similarly, in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,*[69] the Court held that, while the mere possibility of discretionary parole release was not protected by due process, the state created a constitutionally-protected expectation of parole by basing the determinations on fact-specific criteria. And in *Wolff v. McDonnell,*[70] the Supreme Court held that statutory restrictions on the forfeiture of "good-time" credits to major acts of misconduct prevented the state from depriving inmates of "good time" absent a hearing.

As with property interests, the agency attorney seeking to circumscribe his or her client's duty to provide process must ask what types of statutory or regulatory limits on official discretion trigger a constitutionally-protected liberty interest. Like property, liberty interests are not created by state laws establishing procedural requirements for decisionmakers.[71] Moreover, unilateral expectations of liberty, such as those grounded on past governmental practices, do not implicate a constitutional interest.[72]

A state law that affirmatively limits the *substance* of official discretion is needed to create a liberty interest. If the official has unfettered discretion to accord or deny a benefit, no protected interest exists.[73] Conversely, if the law establishes standards or criteria that guide the exercise of discretion, a liberty interest arises.[74]

The implications of the positivist view of due process in the military setting are clear. If military statutes or regulations impose substantive limits on the discretion of government officials to withhold or terminate benefits or entitlements associated with the armed forces, some form of process will first be required to ensure that those substantive criteria have been met.

Several Army regulations impose such limits on discretion. For example, Army regulations limit installation commanders' discretion to terminate exchange and commissary privileges to instances of abuse of those

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[62] Hewitt v. Helms, 459 U.S. 460, 468 (1983); Montanye v. Haymes, 427 U.S. 236, 242 (1976); Meachum v. Fano, 427 U.S. 215, 224 (1976); Lucas v. Hodges, 730 F.2d 1493, 1499 (D.C. Cir. 1984).

[63] Olim v. Wakinekoa, 461 U.S. 238, 244–45 (1983); Montanye v. Haymes, 427 U.S. 236, 242 (1976); Meachum v. Fano, 427 U.S. 215, 224 (1976).

[64] Montanye v. Haymes, 427 U.S. 236, 242 (1976); Meachum v. Fano, 427 U.S. 215, 224 (1976). Prisoners still retain a residuum of liberty, the implication of which may give rise to due process requirements. *See* Vitek v. Jones, 445 U.S. 480 (1980) (transfer of prisoner from prison to a mental hospital implicates liberty).

[65] 459 U.S. 460 (1983).

[66] *Id.* at 470–71 n.6.

[67] *See, e.g.,* Montanye v. Haymes, 427 U.S. 236, 242 (1976); Meachum v. Fano, 427 U.S. 215, 224 (1976).

[68] Hewitt v. Helms, 459 U.S. at 471–72. *Compare* Santiago v. Garcia, 821 F.2d 822 (1st Cir. 1987); Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986) *with* Hall v. Unknown Named Agents of the N.Y. State Dep't for Correctional Serv., 825 F.2d 642 (2d Cir. 1987).

[69] 442 U.S. 668 (1979).

[70] 418 U.S. 539 (1974).

[71] Olim v. Wakinekoa, 461 U.S. 238, 250–51 (1983); Brandon v. District of Columbia Bd. of Parole, 823 F.2d 644, 648 (D.C. Cir. 1987); Beard v. Livesay, 798 F.2d 874, 878 (6th Cir. 1986); Huggins v. Isenbarger, 798 F.2d 203, 206 (7th Cir. 1986).

[72] Jago v. Van Curen, 454 U.S. 14 (1981) (per curiam); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Huggins v. Isenbarger, 798 F.2d 203, 206 (7th Cir. 1986).

[73] Olim v. Wakinekoa, 461 U.S. 238, 249 (1983); Williams v. Walls, 744 F.2d 1345, 1346 (8th Cir. 1984); Valasco-Gutierrez v. Crossland, 732 F.2d 792, 796 (10th Cir. 1984); Lucas v. Hodges, 730 F.2d 1493, 1504 (D.C. Cir. 1984).

[74] Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 668 (1980); Wolff v. McDonnell, 418 U.S. 539 (1974). The irony of insulating from due process and judicial review only those decisions that prison officials make in the absence of any substantive criteria has not escaped the commentators:

> [I]t appears anomalous for the courts to be totally unable to require procedures when the state leaves the decision regarding a benefit to administrative discretion by failing to grant a "substantive right," and to be free to mandate procedures when the state does establish a substantive right and provides rudimentary procedures for the benefit's termination. Why should the courts on the one hand be paralyzed when a state permits its officials to engage in utterly discretionary decision-making, and on the other hand be commissioned with the full power of procedural review when a state improves this situation by crystallizing a substantive right and establishing procedures?

Note, *Two Views of a Prisoner's Right to Due Process:* Meachum v. Fano, 12 Harv. C.R.-C.L. L. Rev. 405, 418–19 (1977).

privileges.[75] Similarly, regulations impose substantive criteria for the cessation of government housing,[76] the suspension or revocation of installation driving privileges,[77] and the termination of check-cashing privileges.[78] Before the government can discontinue these entitlements, it must first afford the recipient some form of process to determine whether the substantive predicates are satisfied.[79]

On the other hand, in some areas military statutes and regulations have been crafted—by chance or design—to avoid creating interests protected by the due process clause. For example, commanders have plenary discretion to bar civilians from their installation. No statute or regulation imposes substantive restrictions on that discretion. Hence, no process is constitutionally due before a commander orders a civilian barred from the post.[80] Similarly, commanders have virtually unlimited authority to terminate morale, welfare, and recreation privileges,[81] and to relieve or reassign subordinates.[82]

Judge advocates at all levels must exercise care in drafting or reviewing Army or subordinate command regulations or policies to ensure that unintended interests are not established. For example, a local command policy that sets out grounds (e.g., misconduct) for barring civilians from post will create a property interest in access to the installation or a liberty interest in freedom from the restraints of a bar letter. Before such an interest can be terminated, the commander must afford notice and the right to be heard. And, more importantly, the adequacy of the procedures provided is subject to judicial review.[83] Thus, no matter how well-intended, the imposition of substantive limits on otherwise plenary command discretion exposes the command to due process requirements and judicial scrutiny.

Moreover, simply because we do not wish to create a constitutionally-protected interest in some benefit or privilege does not mean that no process can accompany its denial or termination. The Army can prescribe procedural requirements without vesting a protected interest. And although the Army must follow the procedural requirements,[84] in the absence of a constitutional right to due process, the procedures are beyond the purview of judicial review for adequacy. Moreover, if the procedures later prove to be cumbersome or undesirable, the Army can eliminate them.[85]

Finally, and unlike property, not all liberty interests are dependent upon the positive law of the state. Most liberty interests are not; instead, they flow directly from the Constitution itself.[86] Liberty is commonly implicated by administrative action when an agency—in the process of depriving an individual of some tangible benefit—stigmatizes the individual. In other words, even when an agency has not established a protected interest in a benefit, it still may constitutionally obligate itself to provide process if it damages the reputation of the individual in the course of withholding or terminating the benefit. For example, if, in denying a person access to an installation, a commander also publicly besmirches the individual's reputation, honor, or integrity, the courts will find the implication of a liberty interest through the stigma imposed by the commander's charges.[87]

Harm to reputation, standing alone, does not implicate liberty;[88] however, an agency's denial or termination of even an unprotected benefit, such as access to an installation, together with stigmatizing allegations, may be enough to trigger the need for due process.[89] Process under these circumstances permits the stigmatized individual the opportunity to clear his or her name.[90]

An agency averts process when it denies or terminates a benefit for potentially stigmatizing reasons by not making the information public.[91] Absent release of the unfavorable allegations, the individual suffers no harm. Even if the agency retains the damaging materials in its confidential

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[75] Dep't of Army, Reg. No. 30–19, Food Program—Army Commissary Store Operating Policies, paras. 4–11 to 4–12 (1 June 1980); Dep't of Army, Reg. No. 60–20, Exchange Service—Army and Air Force Exchange Operating Policies, para. 2–15 (1 Aug. 1984); Dep't of Army, Reg. No. 640–3, Personnel Records and Identification of Individuals—Identification Cards, Tags, and Badges, ch. 4 (17 Aug. 1984). *See generally* Wilkerson, *Administrative Due Process Requirements in the Revocation of On-Post Privileges*, 73 Mil. L. Rev. 107, 150–58 (1976).

[76] Dep't of Army, Reg. No. 210–50, Installations—Family Housing Management, para. 3–26 (1 Feb. 1982) [hereinafter AR 210–50]. *See generally* Wilkerson, *supra* note 75, at 141–50.

[77] Dep't of Army, Reg. No. 190–5, Military Police—Motor Vehicle Traffic Supervision, ch. 2 (1 Aug. 1973) [hereinafter AR 190–5]. *See generally* Wilkerson, *supra* note 75, at 130–41.

[78] Dep't of Army, Reg. No. 210–60, Installations—Control and Prevention of Abuse of Check-Cashing Privileges, ch. 2 (15 June 1984).

[79] The family housing regulation, AR 210–50, does not afford a hearing before termination of quarters. *Id.*, para. 3–26c. Perhaps the need for process is obviated by the automatic substitution of a basic allowance for quarters for government housing. *Id.*

[80] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); United States v. Albertini, 783 F.2d 1484 (9th Cir. 1986).

[81] Dep't of Army, Reg. No. 215–1, Morale, Welfare, and Recreation—the Administration of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities, para. 2–18*f* (privileges may be suspended, terminated, or denied whenever the commander deems it to be in the best interests of the activity, the installation, or the Army). *But see* Wilkerson, *supra* note 75, at 158–60.

[82] Wilson v. Walker, 777 F.2d 427 (8th Cir. 1985); Arnheiter v. Ignatius, 292 F. Supp. 911 (N.D. Cal. 1968), *aff'd sub nom.* Arnheiter v. Chaffee, 435 F.2d 691 (9th Cir. 1970).

[83] *See supra* notes 34–43 and accompanying text.

[84] *See supra* note 58.

[85] *See* Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986).

[86] *See supra* note 59.

[87] Wisconsin v. Constantineau, 400 U.S. 433 (1971); Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 149 (1950) (Frankfurter, J., concurring).

[88] Paul v. Davis, 424 U.S. 693 (1976).

[89] *See* Colaizzi v. Walker, 812 F.2d 304, 307 (7th Cir. 1987).

[90] Codd v. Velger, 429 U.S. 624, 627–28 (1977) (per curiam).

[91] Bishop v. Wood, 426 U.S. 341, 348–49 (1976).

files, the agency does not trigger a liberty interest or a need for process.[92]

Automatic Termination of Interests/Interests Dependent Upon Unique Expertise

Judge advocates have two other tools by which they can insulate the Army from needless process and judicial intrusion. Where the Army affords individuals a property interest in an entitlement or benefit, it might limit its exposure under the due process clause by making the interest terminable upon the occurrence of some objective event or by conditioning the benefit on the exercise of some uniquely-held expertise. Because the individual already has a constitutionally-protected interest, however, these approaches are necessarily difficult and uncertain.

At least two Supreme Court decisions provide support, albeit tangential, for the proposition that an agency can establish objective criteria that, when they are present, automatically terminate property interests. In *Dixon v. Love,*[93] the Court held that the State of Illinois was not required to provide a hearing before suspending or revoking licenses of drivers who accumulated a specified number of traffic offenses. The Court based its decision, in part, on the unlikelihood that, given the clear criteria for suspension, the state would erroneously deprive an individual of a license.[94] Similarly, in *Mackey v. Montrym,*[95] the Court declined to require a presuspension hearing for drivers who lost licenses because of a refusal to submit to a breath-analysis test. The Court noted that there would rarely be any genuine dispute as to the facts giving rise to the suspension because the only question was whether the driver refused the test, the submission to the test being a condition of the driver's license.[96]

The Supreme Court did not hold in either *Dixon* or *Mackey* that a state could condition the existence of a property interest on certain objective factors, the presence of which would extinguish the interest; however, the decisions do provide a basis for such a result.[97] Some lower courts have permitted the state to so limit property interests.

For example, in *Ybarra v. Bastian,*[98] the plaintiff was an employee of the State of Nevada who was fired after his conviction by a state court for murdering a fellow employee. Nevada employment regulations permitted termination of employees for serious offenses,[99] and Nevada statutes gave the plaintiff a property interest in his job as well as a right to a hearing before termination.[100] The state did not afford the plaintiff a hearing before firing him. The plaintiff sued, claiming that he had been deprived of a property interest without due process. The Court of Appeals for the Ninth Circuit rejected his claim, holding that whatever property interest the plaintiff had in his job could be extinguished by an automatic disqualifier for continued employment: "An employee with a property interest in continued employment will have that interest extinguished . . . in those rare circumstances in which the employee is determined to have what amounts to automatic disqualification for future employment."[101]

Similarly, in *Beller v. Middendorf,*[102] the Ninth Circuit held that the Navy was not required to afford due process to sailors discharged as homosexuals where homosexuality was an automatic bar to service and where the sailors freely admitted their sexual proclivities. The court determined that the Navy regulations and practices created no reasonable expectation of continued employment once the Navy found that a sailor fell into one of the automatic service disqualifiers in the regulation.[103]

In the military, the most obvious use of objective criteria to extinguish protected interests appears in the installation driving privileges regulation.[104] For example, the regulation mandates immediate suspension of driving privileges upon refusal to submit to a breath-analysis or blood alcohol test,[105] although the regulation affords some process after revocation.[106] Similarly, the family housing regulation requires the automatic termination of government quarters for such objectively-determinable criteria as permanent

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[92] Sims v. Fox, 505 F.2d 857, 863 (5th Cir. 1974) (en banc), *cert. denied,* 421 U.S. 1011 (1976); Simmons v. Brown, 497 F. Supp. 173, 179 (D. Md. 1980); Knehans v. Callaway, 403 F. Supp. 290, 297 (D.D.C. 1975), *aff'd sub nom.* Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 995 (1978). If the individual, rather than the agency, releases the adverse information, liberty is not implicated. The government, not the individual, must cause the stigma. Shlay v. Montgomery, 802 F.2d 918 (7th Cir. 1986); Thomason v. McDaniel, 793 F.2d 1247 (11th Cir. 1986); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).

[93] 431 U.S. 105 (1977).

[94] *Id.* at 113–14; *see* Mathews v. Eldridge, 424 U.S. 319 (1976).

[95] 443 U.S. 1 (1979).

[96] *Id.* at 14–15.

[97] Professor Terrell analogizes the concept that a property interest can be conditioned upon the occurrence (or nonoccurrence) of a readily identifiable event to the common law "defeasible fee." Terrell, *supra* note 27, at 871, 890. For example, if a person conveying ownership in real estate provided in the deed that the transferee would own the property only as long as he did not sell alcoholic beverages on the premises, the holder of the reversion could repossess the land if the transferee violated this condition. *Id.* at 890 n.158. The same reasoning applies to government-furnished property interests conditioned upon the existence or nonexistence of certain objective factors. Another way to look at the concept is to analogize the property interest to a piece of Swiss cheese, the holes (conditions under which the interest is furnished) corresponding to the rights government never extends to the individual. *Id.* at 890–91.

[98] 647 F.2d 891 (9th Cir. 1981).

[99] *Id.* at 893 n.3.

[100] *Id.* at 893 n.1.

[101] *Id.* at 893.

[102] 632 F.2d 788 (9th Cir. 1980), *cert. denied,* 452 U.S. 905 (1981).

[103] *Id.* at 805; *see also* benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980); *accord* Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).

[104] AR 190–5, ch. 2.

[105] *Id.*, paras. 2–2a(2)(b), 2–2b(3)(a) (I06, 17 July 1985).

[106] *Id.*, para. 2–2d.

change of station.[107] Carefully-drafted objective standards might also be constructed to extinguish property interests in other areas, such as revocation of exchange or commissary privileges for certain designated offenses, such as shoplifting or bad checks.[108]

Even if the Army imposes automatic, objectively-discernible disqualifiers on property interests, it may terminate protected entitlements only if the recipients do not dispute the factual existence of the automatic disqualifiers or the presence of the disqualifiers are unlikely to be contested. Of course, such automatic disqualifiers are subject to judicial scrutiny under substantive due process or some other constitutional provision.[109]

At the other end of the spectrum from the objectively-determined automatic disqualifiers, an agency may rely on subjective, professional judgments in terminating established property or liberty interests. Where agency decisions concerning the abrogation of property or liberty interests are based on some uniquely-held expertise, the courts have sometimes been reluctant to interfere with the agency's determinations. This reluctance is especially evident in challenges to the academic decisions of educational institutions. In *Board of Curators v. Horowitz,*[110] the Court upheld the dismissal of a medical student for academic deficiencies without a hearing. Without deciding whether the student's liberty or property interests were implicated by the dismissal, the Court held that a school need not afford a student an adversarial-type proceeding before dismissing the student for academic deficiencies. Adversarial fact-finding procedures were deemed unsuitable to academic evaluations of students; instead, the judgment was one for professional educators:

> The decision to dismiss respondent . . . rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward the goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.[111]

To similar effect is *Youngberg v. Romero,*[112] in which the Court relied on the judgments of professionals in restricting the liberty of a profoundly retarded patient committed to a state institution. The Court found that the patient "enjoy[ed] constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests."[113] In deciding whether the state had fulfilled these duties, however, the Court looked to the judgment of the professionals: "In determining whether the State has met its obligations in these respects, decisions made by appropriate professionals are entitled to a presumption of correctness. Such a presumption is necessary to enable an institution of this type—often, unfortunately, overcrowded and understaffed—to continue to function."[114]

Reliance by the Army on the need for unique, professional expertise to terminate or circumscribe property or liberty interests is somewhat problematic and certainly limited. This approach will not be available in most cases. The Army can assert the need to rely on professionals only when the matters involved are not well suited to an adjudicatory procedure and when lawyers and laymen lack the capacity to resolve the issues.

For example, the Army need not provide formal process before separating officers who fail to satisfactorily complete the academic requirements of their basic officer course. The decision is neither suitable for adversarial proceedings nor likely to be second-guessed by a federal court.[115] Both Army and Judge Advocate General's School regulations, however, provide a formal hearing before dismissal for academic deficiencies.[116] While laudable, the procedures are constitutionally unnecessary. The Army can also assert the need to obviate adjudicatory procedures in matters requiring the unique judgment of military professionals. Courts have refused, for example, to interfere with promotion decisions because of the highly-specialized expertise involved.[117] Similar judgments are necessary for assignment determinations and selections for command and schooling.

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[107] AR 210–50, para. 3–26*a*(1).

[108] *See supra* notes 75, 78.

[109] Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied,* 452 U.S. 905 (1981).

[110] 435 U.S. 78 (1978).

[111] *Id.* at 89–90; *see also* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Harris v. Blake, 798 F.2d 419 (10th Cir. 1986). Courts treat suspensions or expulsions from schools for disciplinary reasons (*e.g.*, misconduct) differently. Such decisions are not grounded on the academic judgment of teachers and administrators, and are amenable to adversarial-type proceedings. Consequently, courts will require some process before such suspensions or expulsions. Goss v. Lopez, 419 U.S. 565 (1975); Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972); Wasson v. Trowbridge, 383 F.2d 807 (2d Cir. 1967).

[112] 457 U.S. 307 (1982).

[113] *Id.* at 324.

[114] *Id.*

[115] Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Board of Curators v. Horowitz, 435 U.S. 78 (1978).

[116] Dep't of Army, Reg. No. 635–100, Personnel Separations—Officer Personnel, paras. 3–20 to 3–22 (15 Feb. 1969) (C27, 1 Aug 1982); The Judge Advocate General's School, Reg. No. 10–2, Policies and Procedures, section ZA–2, para. 9 (15 May 1986).

[117] *See, e.g.,* Brenner v. United States, 202 Ct. Cl. 678, 682 (1973), *cert. denied,* 419 U.S. 831 (1974):

> The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to resolve and pass upon the highly complicated questions and problems involved in the promotion procedure, which includes, but is not limited to, an analysis of fitness reports and the personal qualifications of the officers considered . . . .

Conclusion

The Army has an obligation to treat the public, its soldiers, and its employees fairly and with respect and dignity. It also has a duty to accomplish its mission efficiently, cheaply, and in a timely manner. If the Army can treat those with whom it deals fairly and with respect without having to incur the expense of costly administrative procedures and exposure to needless litigation, it should do so.

Judge advocates share much of the responsibility for ensuring that the Army does not furnish excessive adjudicatory process or create interests that may lay the groundwork for later lawsuits. Both draw needed resources from the military's single mission—to fight and to be ready to fight wars as the occasion arises. Moreover, in this litigious society, judge advocates have an obligation to their client to limit its exposure to lawsuits rather than merely reacting to suits as they are filed. We go far in fulfilling this obligation by thinking about the requirements of due process and by using the tools the courts have given us to minimize unnecessary procedures and vexatious litigation.

The New NAF Contracting Regulation

*Margaret K. Patterson**
U.S. Army Community and Family Support Center

Introduction

The newly published Army Regulation (AR) 215–4, Nonappropriated Fund Contracting,[1] supersedes chapter 21, AR 215–1[2] and DA Pamphlet 215–4,[3] combining policy and practical "how to do it" guidance for both small and large purchases into one comprehensive regulation. This new regulation is more than a melding of previous coverage, however. It also addresses topics not heretofore considered, makes some significant changes, and treats some old topics in greater depth.

The new regulation applies to all Army nonappropriated fund (NAF) contracting activities, except the Army-Air Force Exchange Service, the U.S. Army Reserve, the Army National Guard, and the Chaplain's Fund. By contrast, DA Pam 215–4 had broader exemptions that excluded the U.S. Army Community and Family Support Center (USACFSC) (the proponent of the regulation), the Hale Koa Hotel, and U.S. Army Europe. Supplementation of the new regulation requires the approval of USACFSC. The effective date of AR 215–4 is 1 January 1988.

Regulatory Changes

Bid Protests

A new policy covering protests[4] differentiates between a NAF solicitation issued by an appropriated fund (APF) contracting officer and one issued by a NAF contracting officer. The policy on the former reflects the Comptroller General's interpretation[5] of the Competition in Contracting Act[6] and provides that, when the solicitation involving nonappropriated funds has been issued by an APF contracting officer, the procedures set forth in the Federal Acquisition Regulation subpart 33.1[7] and its supplements will be followed. Where the solicitation has been issued by a NAF Contracting Officer, the policy encourages resolution of protests through conferences with the protestor, but does not require delay of contract award. In this case, unresolved protests may be appealed to the installation commander or designee within seven days of receipt of the contracting officer's written decision on the protest. No appeals are permitted beyond the installation commander level.[8]

Credit Cards

Another new area of coverage is commercial credit card contracts.[9] The new regulation permits nonappropriated fund instrumentalities (NAFIs) to contract for accounts receivable services for an initial one-year period, with an option for annual renewals up to five additional years. These contracts must be awarded on a competitive basis with at least two major credit card companies being solicited. Suggested areas of contract coverage include training, furnishing of materials, maintenance, and minimum sales

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[1] Dep't of Army, Reg. No. 215–4, Morale, Welfare, and Recreation—Nonappropriated Fund Contracting (9 Dec. 1987) [hereinafter AR 215–4].

[2] Dep't of Army, Reg. No. 215–1, Morale, Welfare, and Recreation—The Administration of Army Morale, Welfare and Recreation Activities and Nonappropriated Fund Instrumentalities (20 Feb. 1984) [hereinafter AR 215–1]. This regulation is contained in the MWR UPDATE. Although AR 215–4 has been issued as a separate publication, it will be included in MWR UPDATE No. 14 when it is published in February 1988.

[3] Dep't of Army, Pamphlet No. 215–4, Morale, Welfare, and Recreation—Nonappropriated Fund Small Purchases, (26 Aug. 1985) [hereinafter DA Pam. 215–4]. This pamphlet is also contained in the MWR UPDATE.

[4] AR 215–4, para. 4–40.

[5] Comp. Gen. Dec. B–2220372 (3 July 1986).

[6] 31 U.S.C. § 3551–3556 (Supp. III 1985).

[7] Federal Acquisition Reg subpart 33.1 (1 Apr. 1984) [hereinafter FAR]. The Defense FAR Supp. (1 Apr. 1984) and the Army FAR Supp. (1 Dec. 1984) will be cited as DFARS and AFARS, respectively.

[8] AR 215–4, para. 4–40g.

[9] *Id.*, ch. 5, § IX.

requirements. The regulation indicates that the discount rate (*i.e.*, the percentage of the dollar amount charged by the customer that will be deducted as payment for performing the account receivable services for the NAFI) is most likely to dominate as an evaluation factor.

Warrant Limitations

The dollar limitation on a NAF contracting officer's warrant for purchases for resale has been raised from $25,000 to $50,000.[10] These dollar limitations, however, do not apply to concession contracts[11] or to contracts issued by USACFSC, the Hale Koa Hotel, or the Nonappropriated Fund Supply Acquisition and Contracting Agency, Europe (NAFSAC).[12]

Training requirements to obtain a NAF warrant have also been changed, reflecting the existence of the Nonappropriated Fund Purchasing and Contracting (ALMC–NA) course. This new course can now substitute for the Management of Defense Acquisition Contracts (Basic) Course to qualify an individual for a warrant of $25,000 ($50,000 for resale items).[13]

In accordance with the Standard Installation Organization (SIO),[14] the new regulation provides for placement of the installation NAF contracting activity under the Services Division and provides that the Assistant Director for Community and Family Activities (ADCFA) will recommend, with complete justification, the appointment of a NAF contracting officer to the installation commander or designee.[15] Previously, chapter 21 of AR 215–1 and DA Pam 215–4 were in conflict on this point, as the former provided that the NAFI Fund Manager was responsible for recommending someone to be a contracting officer,[16] but the latter provided that an individual's supervisor could do this.[17]

Provisions for ordering officers are essentially the same, except they may not place orders in excess of $2500 against indefinite delivery contracts.[18]

Approval and Purchase Levels

Approval and purchase levels have been revised to reflect the increase in resale-warrant dollar limitations.[19] All procurement requests require ADCFA approval, and those in excess of $25,000, except merchandise for resale, require approval by the installation commander or designee. Approval levels for USACFSC and the Hale Koa Hotel will be as established by the Commander, USACFSC.[20] As before, the approval level for construction projects is governed by AR 215–1.[21]

Legal Review

Legal review requirements are now broken down into two categories, mandatory reviews and those that are subject to the availability of legal resources. As before, mandatory legal reviews include all solicitations anticipated to be in excess of $100,000,[22] all decisions concerning disputes, protests and appeals,[23] termination actions,[24] recommendations for suspension and debarment,[25] blanket purchase agreement formats,[26] ratification actions,[27] and concessionaire, professional service[28] and amusement company contracts.[29] In addition to the foregoing, the new regulation adds the following categories to the list of mandatory legal reviews: decisions concerning release of information under the Freedom of Information Act,[30] proposed awards that may result from an unsolicited proposal, requests for use of other than a firm fixed-price contract, and determinations on whether proposed services are for personal or nonpersonal services when this is not clearly ascertainable.[31]

Non-mandatory legal reviews are subject to availability of legal resources. This category includes certain entertainment contracts, real estate transactions, and questions concerning tax status of NAFIs.[32] Decisions concerning late proposals and mistakes and show cause and cure notices also no longer require legal review.

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[10] *Id.*, para. 1–6*i*(2). Compare DA Pam 215–4, para. 1–4*d*(4).

[11] *Id.*, para. 1–6*i*(5).

[12] *Id.*, para. 1–6*i*(4).

[13] *Id.*, para. 1–7*c*.

[14] *See* AR 215–1, para. 2–5.

[15] AR 215–4, para. 1–7*b*.

[16] AR 215–1, para. 21–3*b*(2).

[17] DA Pam 215–4, para. 1–3.

[18] AR 215–4, para. 1–6*h*(3)(b).

[19] *Compare* DA Pam 215–4, app. B *with* AR 215–4, App. B.

[20] AR 215–4, para. 1–12*a*.

[21] *See supra* note 19.

[22] *See* AR 215–1, para. 21–20c; AR 215–4, para. 1–13*a*(1)(a).

[23] *See* AR 215–1, para. 21–30; AR 215–4, para. 1–13*a*(1)(c).

[24] *See* DA Pam 215–4, app. C, para. e; AR 215–4, para. 1–13*a*(1)(d).

[25] *See* DA Pam 215–4, app. C, para. g; AR 215–4, para. 1–13*a*(1)(e).

[26] *See* DA Pam. 215–4, app. C, para. h; AR 215–4, para. 1–13*a*(1)(f).

[27] AR 215–1, para. 21–29*d*(4)(c); AR 215–4, para. 1–13*a*(1)(i).

[28] AR 215–1, para. 21–11*b*; AR 215–4, para. 1–13*a*(1)(h).

[29] AR 215–1, para. 21–12; AR 215–4, para. 1–13*a*(1)(h).

[30] 5 U.S.C. § 552 (1982).

[31] AR 215–4, para. 1–13*a*(1).

[32] *Id.*, para. 1–13*a*(2).

Absent from both categories of legal review are sole-source procurements (previously a mandatory review).[33] No legal review whatsoever is required unless, of course, the procurement also falls into one of the mandatory legal review categories.

The new regulation now expressly requires that all legal review be in writing, detail any legal insufficiency, and recommend corrective action.[34] Any unresolved differences are to be referred to the installation commander or designee for resolution.[35]

Concession Contracts

The use of concession contracts is now conditioned on an authorization by the installation commander or designee,[36] whereas the old regulation inexplicably personally required the installation commander to approve concession contracts with sports professionals, but not others.[37] The old requirement that concessionaire contracts be processed whenever possible by the APF procurement office[38] has been deleted, but legal review is still required.[39] An exception to the requirement for installation commander or designee approval is made for short-term (defined as ten days or less) concession contracts, which require approval only at the ADCFA level.[40]

The unique nature of concession contracts is recognized in a number of other areas of the new regulation. As mentioned earlier, the dollar limitations of a NAF warrant do not apply to concession contracts.[41] Imposing insurance requirements on the contractor is now left to the complete discretion of the contracting officer.[42] For concession contracts only, a "no-fault" termination clause[43] may be used in lieu of the standard termination for convenience clause. This optional clause permits either party to terminate the contract upon thirty days written notice. Not surprisingly, the provisions regarding uniform procurement instrument identification numbers (PIIN) have an added category for distinguishing concession contracts from other types of procurement documents.[44]

Service Contracts

The policy on personal service contracting has been clarified. The regulation provides clear guidance on distinguishing between personal and nonpersonal service-type contracts,[45] and contracting officers are directed to obtain legal review if in doubt.[46] The regulation states that Army NAF policy is to obtain personal services by the appointment of employees to NAF positions.[47]

A separate provision[48] addresses the limitations that exist with regard to NAF contracts with government employees. The regulation prohibits the use of NAF contracts to obtain non-personal services[49] or supplies from government or NAFI personnel, including businesses that are substantially owned or controlled by such personnel.[50] An exception is made for contracts with enlisted personnel. Also, a major command or higher headquarters may approve contracts with civilian and other military personnel when there is a most compelling reason.[51]

Also, a Privacy Act[52] statement and contract provisions have been added for complying with IRS reporting requirements applicable to service contracts with individuals.[53]

Entertainment and Amusement Contracts

Entertainment contracts now have separate coverage in the new regulation. The regulation provides practical guidance on the criteria for solicitation and award.[54] While there is no requirement for competition, price comparisons are to be obtained, and agencies are to be rotated when feasible. Cancellation clauses, along with liquidated damage provisions, are required, but insurance requirements are left to the discretion of the contracting officer.[55]

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[33] *See* DA Pam 215–4, app. C, para. f.

[34] AR 215–4, para. 1–13*b*.

[35] *Id.*

[36] *Id.*, para. 5–19.

[37] AR 215–1, para. 21–11*a*.

[38] *Id.*, para. 21–11*b*.

[39] AR 215–4, para. 1–13*a*(1)(h).

[40] *Id.*, para. 5–21. Note that the 10 days need not be consecutive.

[41] *See supra* note 11.

[42] AR 215–4, para. 5–24.

[43] *Id.*, para. 7–24*b*.

[44] *Id.*, para. 2–1*e*(3).

[45] *Id.*, para. 5–7*c* and *d*.

[46] *Id.*, para. 1–13*a*(1)(k) and para. 5–6*a*(2).

[47] *Id.*, para. 5–7*a*.

[48] *Id.*, para. 4–3*a*.

[49] Non-personal service contracts may be used to obtain consulting services and professional services, including those provided by sports professionals. *See* AR 215–4, paras. 5–6*e*, 5–10, and 5–12.

[50] AR 215–4, para. 4–3*a*.

[51] *Id.*

[52] 5 U.S.C. § 552a (1982).

[53] AR 215–4, para. 5–6*b*.

[54] *Id.*, para. 5–28.

[55] *Id.*, para. 5–32*d*.

For amusement companies and traveling shows, AR 215–4 exempts nationally-know firms from competition requirements.[56] Insurance is to follow state law requirements as a matter of Army policy (even if not applicable as a matter of law),[57] and indemnification provisions are required. The most favorable financial return to the NAF is one factor, among several, that will be considered in evaluating competing offers.[58]

Subsistence

The previous broad practical coverage[59] on the purchase of subsistence items such as food and beverages has been continued, but is now part of an expanded section on resale that includes consumables, such as paper napkins, fuel, and postage stamps.[60] The requirement to use FAR clauses in requirements contracts for subsistence items[61] has been deleted and the ADCFA is named as the approval authority for all resale items.[62]

Construction and A–E Contracts

AR 215–4 greatly expands upon the policies and procedures governing construction and architect-engineer (A–E) contracts.[63] The regulation cross-references a Department of Defense (DOD) Instruction[64] and the Army Federal Acquisition Regulation Supplement for the dollar thresholds that require accomplishment of construction and A–E contracts by the APF contracting officer. The AFARS was recently changed[65] to provide that construction contracts exceeding $25,000 and all A–E contracts under cognizance of Commander, USACFSC, shall be accomplished by either APF contracting officers or by USACFSC. The regulation specifies requirements for announcing A–E requirements in the Commerce Business Daily.

Interior design and kitchen design requirements, regardless of whether the design was done in-house (*i.e.*, by USACFSC's Field Operations Directorate) or by an installation contract, will be competed and awarded as a total package, unless the installation commander or designee grants an exception. If an exception is granted, then specific items in the design package must be competed.[66]

Overseas Shipments

No major changes have been made to the section on overseas shipments,[67] but the regulation highlights the importance of the contract specifying point of acceptance for overseas shipments, if different from the point of delivery.[68] Also, reference is made to the DOD Directive governing purchases in support of overseas NAFIs from foreign sources.[69]

Acquisition Planning

AR 215–4 contains extensive coverage on acquisition planning, which is a change from the old regulation. The regulation covers topics such as establishing milestones, certifying funds, and developing specifications.[70] Procedures for describing a requirement in terms of "brand name or equal" are included.[71] A five-year time limit has been established for contract term, in the absence of prior approval from the commander of the major command (MACOM).[72] This limitation applies to all contracts except construction contracts or other project-type contracts which specify a completion date.[73]

For the first time, it is now clear that synopsizing acquisitions (other than A–E requirements)[74] in the Commerce Business Daily is an optional, not mandatory, method of locating sources.[75] AR 215–4 also addresses for the first time the situation where only one quotation is received. The new regulation eliminates the dilemma faced by contracting officers under DA Pam 215–4 which, absent a valid sole-source justification, required competition for purchases over $1,000 while at the same time providing that competition did not exist absent the receipt of two responsive offers.[76] Now when this situation arises, contracting officers are instructed to place a written memorandum in the contract file explaining the reason for the absence of competition.[77]

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[56] *Id.*, para. 5–39.

[57] *Id.*, para. 5–42*d*.

[58] *Id.*, para. 5–46.

[59] DA Pam 215–4, ch. 6.

[60] AR 215–4, ch. 5, sec. VII.

[61] *See* DA Pam 215–4, para. 6–4*b*.

[62] AR 215–4, para. 5–54.

[63] *Id.*, ch. 5, sec. III.

[64] Dep't of Defense Instruction No. 4105.67, Nonappropriated Fund Procurement Policy (Oct. 2, 1981).

[65] *See* AFARS 1.9003.

[66] AR 215–4, para. 5–16.

[67] *Id.*, ch. 6.

[68] *Id.*, para. 6–11.

[69] Dep't of Defense Directive No. 7060.3, International Balance of Payments Program, ch. 1 (Jan. 25, 1984).

[70] *See generally* AR 215–4, ch. 3.

[71] *Id.*, para. 3–8.

[72] *Id.*, para. 1–15*a*.

[73] *Id.*, para. 1–15*b*.

[74] *Id.*, para. 5–15*b*.

[75] *Id.*, para. 4–6.

[76] DA Pam 215–4, para. 1–9*b*.

[77] AR 215–4, paras. 1–11*b*(1)(c) and 4–8*b*.

The coverage on sealed bidding is still not very extensive, reflecting the strong preference in NAF contracting for negotiated procurement.[78]

In discussing contract types, the new regulation goes beyond the previous expression of a preference for fixed-price versus cost-reimbursement contracts[79] and now requires written justification, legal review, and MACOM and USACFSC approval for cost-reimbursement contracts.[80] As before, there is no discussion of this type of contract.

A whole section of AR 215–4 is devoted to supply and equipment contracts, filling a real gap in AR 215–1 and offering practical advice on establishing a delivery schedule, inspecting and reporting defects, enforcing warranties, and computing chain discounts.[81] Basic Ordering Agreements are identified as a tool to simplify purchasing procedures.[82] Other new areas of coverage include a policy for handling mistakes,[83] liquidated damages,[84] stop-work orders,[85] and unsolicited proposals.[86] Concerning the last item, the regulation includes guidance to assist NAF contracting officers in identifying unsolicited proposals and in avoiding the pitfalls of sole-sourcing to an offeror. For complete coverage on this topic, the reader is referred to the FAR and DFARS.[87]

Contract Management

A new chapter entitled "Contract Management" includes much of the old material[88] pertaining to modifications, change orders, constructive changes, contracting officers representatives, contract claims, and terminations, but in a more organized format.[89] There is new material on option clauses[90] and there is a provision recommending that legal advice be obtained in any situation involving an inexcusable delay.[91]

The section on contract disputes, appeals, and claims[92] contains no substantive changes, but does reflect minor administration changes including address changes for the Armed Services Board of Contract Appeals. The most significant change in the area of terminations is deletion of the old provision[93] that allowed a contract to be reinstated by agreement of the parties anytime a termination for default was used and it later became apparent that the contractor was not in default. Under AR 215–4, the termination for default would be converted into a termination for convenience.[94]

Forms

Virtually all of the old forms have been updated, for the most part reflecting only minor changes such as cross-references to the new regulation. The previously adopted uniform contract format[95] is continued in AR 215–4. Probably the most significant changes in the forms are the complete revision of the contract clauses for construction (DA Form 4075–R) and the addition of a new form DA Form 4067–1–R, entitled "Order for Supplies or Services/Request for Quotations," which is to be used for purchases of $10,000 or less. The latter form, with applicable clauses printed on the reverse side, was undoubtedly inspired by DD Form 1155,[96] although it is not an exact duplicate. Conspicuously absent is a form containing clauses for architect-engineer contracts. These clauses are currently being developed.

Conclusion

AR 215–4 is a comprehensive, better organized regulation that will save the reader the trouble of flipping back and forth between the pages of two documents (*i.e.*, chapter 21 of AR 215–1 and DA Pam 215–4) to see whether a given topic is covered in either or both places. Although AR 215–4 is a long way from being as comprehensive as the FAR, that was not the intent. AR 215–4 continues the philosophy of adopting the FAR when it made sense to do so, such as for unsolicited proposals and negotiation techniques or when required, such as in certain socio-economic areas. The unique nature of NAF procurements, however, continues to be reflected in the regulatory emphasis provided on the types of purchases NAFIs are most concerned about, such as subsistence, entertainment, and concession contracts.[97]

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[78] *Id.*, para. 1–10.

[79] AR 215–1, para 21–7*b*.

[80] AR 215–4, para. 5–1*b*.

[81] *Id.*, ch. 5, sec. VIII.

[82] *Id.*, para. 5–3.

[83] *Id.*, para. 4–41.

[84] *Id.*, para. 7–28.

[85] *Id.*, para. 7–29.

[86] *Id.*, para. 4–42.

[87] FAR and DFARS subparts 15–5.

[88] *See generally* DA Pam 215–4, ch. 9 and para. 1–4; AR 215–1, para. 21–30.

[89] AR 215–4, ch. 7.

[90] *Id.*, para. 7–3.

[91] *Id.*, para. 7–9*b*.

[92] *Id.*, ch. 7, sec. II.

[93] DA Pam 215–4, para. 9–4*g*.

[94] *See* DA Form 4074–R, Apr. 87, Contract Clauses (Nonappropriated Fund Service and Supply Contracts), cl. I–29(g).

[95] Patterned after FAR 15.406–1.

[96] *See* DFARS 53.303–70–DD–1155.

[97] Questions concerning the new regulation may be referred to the author at AUTOVON 221–9374; commercial (202) 325–9374.

Operational Law and Contingency Planning at XVIII Airborne Corps

Lieutenant Colonel Gerald C. Coleman
Chief, Plans, Operations & Mobilization Division, OSJA, XVIII Airborne Corps & Fort Bragg

This is another in a continuing series of articles on the expanding concept of operational law (OPLAW). It illustrates the substantive OPLAW effort being undertaken by staff judge advocate offices in the field. Operational law is defined as follows: "That body of law, both domestic and international, impacting specifically upon legal issues associated with the planning for and deployment of U.S. forces overseas in both peacetime and combat environments."

Introduction

The XVIII Airborne Corps, comprised of the 10th Mountain Division, the 24th Infantry Division (Mechanized), the 82d Airborne Division, and the 101st Airborne Division (Air Assault), possesses unique capabilities for planning and executing contingency operations directed by the National Command Authority (NCA).

It responds to the contingency needs of five Commanders-in-Chief (CINC), with little or no notice, and often with no established plan to cover the particular situation requiring its deployment. Therefore, effective crisis action planning at Corps level is mandatory.

In today's political/military environment, contingency operations are subject to numerous legal constraints, including treaty obligations, host nation law, the law of war, and U.S. domestic law. All personnel connected with military operations must understand that violations of legal constraints may adversely affect the overall accomplishment of U.S. policy objectives, even though the military objective is accomplished. The consideration of operational law issues in all phases of contingency planning enhances the prospect for overall success in Corps operations and, consequently, becomes a combat multiplier.

This article sets forth the application of operational law considerations in contingency planning and resulting operations at XVIII Airborne Corps and the role of the operations law judge advocate. The term "contingency planning" is used in the broadest sense, including not only the technical process of planning, but also all actions necessary to enable the Corps to successfully carry out contingency missions.

The Concept of Operational Law

Operational law consists of that body of domestic and international law that directly affects the planning and execution of peacetime and combat military operations overseas.[1] This area of the law has developed in response to a number of factors affecting military operations in today's political/military environment, including increased attention from the media, greater interest on the part of Congress in all aspects of such operations, and a heightened awareness by the public of the importance of military operations. In this environment, the commander must be cognizant of applicable legal constraints that affect the accomplishment of the mission.

The impact of legal issues on successful mission accomplishment was aptly demonstrated in Urgent Fury, the U.S. military action in Grenada. During that operation, important legal questions arose concerning the status of detainees (including third country nationals), alleged violations of the law of war, implementation of local law, and disposition of claims.[2] The availability of a judge advocate trained in operational law to assist a commander in resolving such politically sensitive legal issues is considered to be a combat multiplier.

Contingency Planning and Operations in XVIII Airborne Corps

Contingency operations are military actions requiring thorough planning under compressed time lines, with many ambiguities, and rapid deployment to perform military tasks in support of national policy.[3] As indicated in Field Manual 100–5, these operations normally are undertaken when vital national interests are at stake and direct or indirect diplomacy and other forms of influence have been exhausted or need to be supplemented by direct military action.[4]

XVIII Airborne Corps is a unique organization within the U.S. Army, capable of simultaneously deploying and employing its forces on either regional or global contingencies. The mission of the Corps is to maintain an airborne force, manned and trained to deploy rapidly by land, sea, and air, anywhere in the world. This command has a paramount need for readiness, and each soldier, including judge advocates, must be prepared to deploy overseas on very short notice.

An analysis of contingency and global plans for which XVIII Airborne Corps bears a degree of responsibility reveals thirty-seven contingency plans and six global plans under five different unified and specified commands. These commands are established by direction of the President to perform a broad, continuing mission. A unified command is composed of forces assigned by two or more U.S. services, operating under the operational command of a single CINC. A specified command is primarily a single service command, although it may have elements of other services

[1] The concept of operational law is rapidly developing. *See, e.g.*, Barnes, *Operational Law, Special Operations, and Reserve Support*, The Army Lawyer, Dec. 1984, at 1; Barnes, *Special Operations and the Law*, Military Rev., Jan. 1986, at 49; Graham, *Operational Law—A Concept Comes of Age*, The Army Lawyer, July 1987, at 9. An excellent resource document in this area of the law is the special text, Theater Planning and Operations for Low Intensity Conflict Environment, published by the U.S. Army War College, Sept. 1986.

[2] *See* Borek, Legal Services During War 40 (23 Mar. 1987) (study project at the U.S. Army War College).

[3] Dep't of Army, Field Manual 100–5, Operations (5 May 1986).

[4] *Id.* at 169.

assigned.[5] Inherent in each plan is the requirement for XVIII Airborne Corps to perform as a joint headquarters for at least the first seventy-two hours after deployment or until a superior joint headquarters can be deployed. Thus, XVIII Airborne Corps must approach all plans from a joint perspective.

The Corps has the capability to conduct the following worldwide missions:

—Immediate support to a requesting CINC.

—Show of force.

—Disaster relief.

—Evacuation of US nationals.

—Secure strategic installations.

—Forced entry.

—Combat operations in a low intensity environment.

—Combat operations in a mid intensity environment for short durations, including airhead establishment in conjunction with securing terrain objectives, and defense against an enemy force in a mid intensity environment until link-up.

The contingency mission statement of the Corps indicates that, when directed, the Corps will deploy to a specific area of operations to conduct military operations and to secure a lodgement area for future operations. The Corps must be prepared to deter or counter direct foreign invasion. It must protect and defend, to the degree possible, critical facilities, bases, and transportation routes. Further, XVIII Airborne Corps must be prepared to escalate operations and conduct combined or unilateral offensive operations to counter direct invasion, restore law and order, and protect U.S. interests in the designated region.

The Corps Operational Planning System

The Corps Operational Planning System (COPS) designed to carry out these missions is comprised of two distinct systems: deliberate planning and crisis action planning. The deliberate planning process consists of five phases in the following sequence.

Phase I Initiation
—CINC receives planning task from the Joint Chiefs of Staff (JCS).
—Major forces available for planning are designated.

Phase II Concept Development
—Mission statement is deduced.
—Subordinate tasks are derived.
—Concept of operation is developed.
The Product: A Concept of Operations

Phase III Plan Development
—Forces are selected and time-phased.
—Support requirements are computed.
—Strategic deployment is simulated.
—Shortfalls are identified and resolved.
—Operation plan is completed.
The Product: A Completed Plan

Phase IV Plan Review
—Operation plan is reviewed and approved by JCS.
—CINC revises plan in accordance with review comments.
The Product: An Approved Plan

Phase V Supporting Plans
—Supporting plans are prepared.
The Product: A Family of Plans

The real test of COPS is in crisis action planning. Those involved in planning realize that, while crises normally develop over a period of several weeks or months, the National Command Authority decision to commit forces requires deployment in hours or days.

Crisis action planning under COPS focuses on that period between receipt of the Joint Chiefs of Staff (JCS) warning order and the JCS execution order, with emphasis on determining which forces should be used, how large the total force should be, and how quickly the force can be deployed. The crisis action planning process follows this sequence:

Phase I Situation Development
—Event perception.
—Problem recognition.
—CINCs assessment.
—JCS/NCA assessment.

Phase II Crisis Assessment
—Increased reporting.
—JCS/NCA evaluation.
—NCA crisis decision.

Phase III Course of Action (COA) Development
—JCS warning order.
—COAs developed major forces & support.
—COAs evaluated.
—Joint Deployment System (JDS) databases established.
—Table of Allowances (TOA) deployment estimates.
—Commander's estimate.

Phase IV COA Selection
—JCS refine and present COAs.
—NCA COA decision.

Phase V Execution Planning
—JCS planning and/or alert order.
—JDS database completed.
—Operation order (OPORD) developed.
—Force preparation.
—Deployability posture reporting.
—NCA execute decision.

Phase VI Execution
—JCS execute order.
—Execute OPORDS.
—JDS database updated.
—Reporting.

This technique is highly developed at XVIII Airborne Corps and is exercised repeatedly in overseas deployments to areas such as Panama and Honduras, during Emergency

[5] *Id.* at 163.

Deployment Readiness Exercises (EDREs) and Joint Operations with sister services, and through aggressive mission-oriented small unit training.

The operational law judge advocate is an integral part of the Corps staff, routinely deploying with the staff on exercises. In the past year, the operational law judge advocate parachuted in with the staff on six exercises: Gold Thrust at Fort Steward, Georgia; AHUAS TARA II at Jamastran, Honduras; AHUAS TARA III at La Paz, Honduras; Night Power at Fort Bragg, North Carolina; and Sand Eagle 87 (Phase III) and Sand Eagle 88 at Avon Park, Florida. Other Corps joint exercises have included Bold Eagle, Gallant Knight, and Solid Shield.

Application of Operational Law to XVIII Airborne Corps Contingencies

A judge advocate is significantly involved in operations planning and execution at XVIII Airborne Corps. This is consistent with Training and Doctrine Command (TRADOC) guidance on the operational concept for providing legal services in potential theaters of operation. The TRADOC guidance indicates that:

> The U.S. Army may engage in a variety of contingencies ranging from integrated battlefields involving essentially all existing conventional forces, to actions involving light, irregular forces. Because hostilities may erupt in any part of the world, flexibility and initiative in delivery of legal services are extremely important.[6]

Working with the Corps staff, the staff judge advocate (SJA) is designated to handle operational law matters. The SJA participates in all stages of deliberate and crisis action planning and is also involved in planning various field training and command post exercises. A Legal Appendix is included in the Personnel Annex of all exercise letters of instruction (LOI) and operation plans (OPLANS). As many exercises are conducted outside the United States, extensive legal participation in determining host nation laws and the exercise of foreign criminal jurisdiction is involved.

To ensure the availability of operational law advice during all stages of operations, the Commanding General (CG), XVIII Airborne Corps, has included a judge advocate in both the assault and tactical command posts (CP). When one considers that the normal complement of the Corps assault CP is only twenty-six persons, including the CG, this readily demonstrates the importance given to operational law in this command. Again, this is consistent with TRADOC guidance, which provides that JAGC personnel will provide legal services as far forward as feasible in a combat environment, to include high, mid, and low intensity conflicts.[7]

The presence of a judge advocate in the assault CP ensures that: operational legal advice is available to the commander on such matters as treaties and international agreements pertaining to the operations area; applicable rules of engagement are properly drafted and briefed to deploying troops; detainees are appropriately classified in accordance with international law and applicable regulations; requests for asylum are transmitted through proper channels; operations are conducted in accordance with the law of war; and that applicable local laws, including provisions for implementation of foreign criminal jurisdiction, are observed, when appropriate. Further, the judge advocate must also consider potential claims under the Foreign Claims Act, the Military Claims Act, the Federal Medical Care Recovery Act, the International Agreement Claims Act, the Use of Government Property Claims Act, the Federal Claims Collection Act, the Advance Payment Act, and Status of Forces and other similar agreements.[8] The deploying judge advocate may also be used to serve as a liaison to U.S. diplomatic representatives or local government officials until the full Corps headquarters is established.

A significant area of operational law is the development of rules of engagement (ROE). ROE are directives that a command may establish to delineate the circumstances and limitations under which its forces will initiate or continue combat with hostile forces.[9] ROE represent the primary means by which the National Command Authority, through the JCS and the unified or specified commander, provides policy guidance to deployed forces. Subordinate commanders may issue supplemental ROE that are more restrictive than those of higher headquarters; however, these supplemental ROE must be consistent with those of the higher command. Subordinate commanders may not publish ROE that are less restrictive than those of higher headquarters without first having obtained authorization from the appropriate command. Clear-cut, sensible, well-understood ROE are a positive factor in successful mission accomplishment.

The operational law judge advocate plays a major role in developing and disseminating ROE within the command. His legal training and the fact that virtually all peacetime ROE are based on the concept of self-defense enable him to draft precise rules within the guidance set forth by the commander and higher authority and explain these rules to the deploying commanders and troops. Vague and ambiguous guidance is a prescription for disaster. During Corps command post exercises (CPX) and field training exercises (FTX), the operational law judge advocate prepares a simplified unclassified version of the exercise ROE, which are published as an appendix to the first combat planning directive. This appendix is then fully briefed to all troops participating in the exercise.

The operational law judge advocate must ensure that all ROE are consistent with domestic law, as well as the law of war, and are sensible and easy to understand. Further, if the commander feels that a change is needed in ROE guidance provided by higher headquarters, the operational law judge advocate should immediately request such a change.

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[6] Training and Doctrine Command, Pamphlet No. 525–52, U.S. Army Operational Concept for Providing Legal Services in Theaters of Operation, para 4a (21 Mar. 1986).

[7] *Id.*, para 4a(1).

[8] For a comprehensive treatment of claims operations during overseas deployment, see Warner, *Planning for Foreign Claims Operations During Overseas Deployment of Military Forces*, The Army Lawyer, July 1987, at 61.

[9] JCS Publication One.

Another way in which the judge advocate may make a valuable contribution to Corps operations is by participating as a member of the Corps Targeting Board. This board may be established as a Joint Targeting Board when the Corps headquarters is part of a Joint Task Force Headquarters, or a Corps Targeting Board when the Corps constitutes the Army forces (ARFOR). As a member, the judge advocate may advise and assist the board by providing general targeting guidance consistent with the requirements of the Hague and Geneva Conventions; reviewing pertinent ROE for conformity with domestic and international law; assisting in the development of target guidance, particularly in regard to politically sensitive targets; and providing advice concerning the legal ramifications of all targeting decisions.

One of the most important functions of the operational law judge advocate is to ensure that deploying Corps units receive legal orientation and support. Legal orientations should address pertinent host nation law, the provisions of applicable stationing arrangements, the exercise of foreign criminal jurisdiction, pertinent ROE, basic law of war provisions, and a comprehensive list of "do's" and "don'ts" in the area to which Corps units are to be deployed. An important aspect of such legal orientation is the collection of legal materials relating to potential deployment areas. Reserve judge advocates serving their active duty training tour at Fort Bragg have proven to be particularly useful in researching and collecting relevant legal materials.

Another function of the operational law judge advocate is to develop training for contingencies. This includes the development of legal items to be included in Master Scenario Events Lists (MSEL) in order to ensure vigorous legal play during CPXs and FTXs. The use of realistic MSELs to introduce legal issues into play is important, as simulated battle rules such as First Battle and Joint Exercise Support System (JESS) do not directly address such issues. Well-drafted, meaningful MSELs introduced into play at an appropriate time during an exercise will generate the desired reaction.

To a great extent, individual judge advocate participation in the operational planning process is based on the extent of the personal working relationship developed with the G–3 and other key staff members.[10] The operational law judge advocate must be perceived by the staff as an asset. To accomplish this, the judge advocate must be well prepared and judicious in the advice he offers. Staff acceptance of a legal advisor's role cannot be mandated. It must be earned by constant, steady, and diligent participation in the planning process. This generates trust and confidence in the judge advocate by other members of the staff. As indicated above, many legal issues affect current military operations. This provides the judge advocate with an opportunity to brief the staff on the nature and ramifications of a wide range of legal matters (*e.g.*, blockade versus quarantine). The operational law judge advocate should be alert to such opportunities and take advantage of them whenever possible.

All judge advocates serving with XVIII Airborne Corps are provided operational law training, when possible, and are assigned to participate in CPXs and FTXs. This has had the effect of raising the level of interest in operational law and ensuring maximum office capability in this area.

Conclusion

In today's political/military environment, the military commander is subject to ever-increasing laws, regulations, and policies that impact on the execution of his mission. This is especially true at XVIII Airborne Corps, as it possesses unique capabilities that ensure its use in planning and executing contingency operations directed by the National Command Authority.

The Judge Advocate General's Corps has recognized the need to have judge advocates involved in the planning for and execution of such contingency operations. The operational lawyer can make a significant contribution to successful mission accomplishment by ensuring that all aspects of applicable domestic and international law are carefully considered in all phases of peacetime and combat military operations.

[10] Graham, *supra* note 1, at 15.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

The Disqualified Judge: Only a Little Pregnant?

Captain William E. Slade
Defense Appellate Division

Support can be found in the existing body of military case law for the proposition that a disqualified military judge may continue to preside over a court-martial, provided the forum is not judge alone. Thus, a disqualified

military judge has the option to either recuse himself or direct trial by members and continue to preside over the court. This option, while attractive from the standpoint of administrative convenience, casts doubt over the fairness of the proceedings. Consideration of the issues raised and problems presented by such a rule leads to the conclusion that it should be rejected.

The Law Governing Disqualification

Rule for Courts-Martial 902[1] governs disqualification of military judges. Subsection (a) states that a military judge "shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Subsection (e) allows for waiver where the ground for disqualification arises only under subsection (a). No waiver may be accepted by the military judge, however, unless it is preceded by a full disclosure on the record of the basis for disqualification.[2]

Subsection (b) of R.C.M. 902 lists specific grounds requiring disqualification. Included among these grounds are personal bias or prejudice concerning a party[3] acting as counsel, investigating officer, staff judge advocate, or convening authority in the same case;[4] being a witness or the accuser in the case; or where a relative within the third degree of relationship to the military judge or his spouse is a party to the proceeding or has an interest that could be substantially affected by the outcome of the proceeding.[5]

The military rule is based on the federal rule governing disqualification of judges,[6] which is itself based on Canon III of the *ABA Code of Judicial Conduct*.[7] Except for some changes in terminology, the military rule is identical to the federal rule. The military rule, on its face, does not allow a judge the option to either recuse himself or direct trial by members. Some decisions by the Court of Military Appeals and the Army Court of Military Review, however, contain dicta suggesting that such an option exists under certain circumstances.

In *United States v. Bradley*,[8] the military judge accepted the accused's pleas of guilty after conducting a providence inquiry and entered findings accordingly. Subsequently, a defect was discovered in the Article 32[9] investigation and defense counsel withdrew his client's guilty pleas.[10] Defense counsel moved for the recusal of the military judge. The motion was denied, but the accused declined to withdraw his request for a judge alone trial, and the judge continued to preside. The Court of Military Appeals held that the military judge abused his discretion by continuing to preside in the trial by judge alone. In dicta, the court stated that "[p]roperly, [the judge] should have either recused himself from the trial entirely, or, as an accused has no right to insist on trial by judge alone, directed a trial by members."[11]

Later, in *United States v. Cooper*,[12] the Court of Military Appeals seemed to retreat from its dicta in *Bradley* by stating that where a military judge has reached conclusions regarding an accused's factual and legal guilt and has manifested those conclusions by accepting guilty pleas and entering findings of guilty, the judge "has no choice and must recuse himself."[13] The court made no mention of any option available to the military judge.

More recently, however, in *United States v. Soriano*,[14] the court seemed to resurrect the *Bradley* dicta by suggesting, once again in dicta, that whether the trial judge had formed definite opinions about the accused's guilt in that case prior to his court-martial was not important because members, not the military judge, found the accused guilty.[15]

The Army Court of Military Review has repeated the *Bradley* dicta, or at least the concept of an option, on several occasions.[16] In *United States v. Sherrod*,[17] the court faced a situation where the military judge had actually exercised the option by directing trial by members rather than recusing himself. The court held that the military judge committed error by failing to recuse himself even though he directed trial by members. The court found no prejudice, however, as both the findings and sentence were adjudged by members.[18] Thus, it appears from *Sherrod* that the "option" cannot be exercised without committing error, though committing harmless error is presumably deemed an acceptable price, at least in the view of the *Bradley* court and other courts recognizing the option.

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 902 [hereinafter R.C.M.].

[2] R.C.M. 902(e).

[3] R.C.M. 902(b)(1) (To be disqualifying, any interest or bias must be personal, not judicial, in nature. *See* R.C.M. 902(b) analysis, at A21–46).

[4] R.C.M. 902(b)(2).

[5] R.C.M. 902(b)(5).

[6] 28 U.S.C. § 455 (1982).

[7] R.C.M. 902 analysis, at A21–45.

[8] 7 M.J. 332 (C.M.A. 1979).

[9] Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982).

[10] *Bradley*, 7 M.J. at 333.

[11] *Id.* at 334 (footnotes omitted).

[12] 8 M.J. 5 (C.M.A. 1979).

[13] *Id.* at 7.

[14] 20 M.J. 337 (C.M.A. 1985).

[15] *Id.* at 341.

[16] *See, e.g.*, United States v. Wiggers, 25 M.J. 587 (A.C.M.R. 1987); United States v. Peterson, 23 M.J. 828, 831 (A.C.M.R. 1986); United States v. Matthews, 13 M.J. 501, 514 (A.C.M.R. 1982).

[17] 22 M.J. 917 (A.C.M.R. 1986), *petition granted*, 24 M.J. 37 (C.M.A. 1987).

[18] *Id.* at 923.

Under federal civilian case law, no such option has been recognized. Federal cases addressing disqualification of judges suggest that once a trial judge is disqualified, recusal is required. Prejudicial error will result from the judge's failure to recuse himself or herself, regardless of whether the judge was the trier of fact.[19]

Problems Associated With Disqualified Judges

Though some military cases have indicated that a disqualified military judge may continue to preside in a case where he directs trial by members, other cases demonstrate that the option is not foolproof. In *United States v. Shackleford*,[20] the Court of Military Appeals stated that unforeseen risks often accompany a refusal by the judge to recuse himself once he is on notice of a version of the facts to which the factfinders are not entitled to be privy.[21] In *Shackleford*, the military judge rejected the accused's tendered guilty pleas based on information he received during the providence inquiry, but continued to preside over the subsequent trial by members. In open court, the accused testified in a manner inconsistent with what he had told the judge during the providence inquiry. The judge questioned the accused before the members in such a way as to highlight his concern with the accused's credibility. The court found that the accused was denied a fair hearing as a result of the judge's questioning.[22]

Similarly, in *United States v. Wiggers*,[23] the Army Court of Military Review acknowledged the *Bradley* option while at the same time suggesting that the disqualified military judge committed prejudicial error under the circumstances by directing trial by members rather than recusing himself.[24] The judge had already determined, through a prior judicial hearing, that a potential witness was a liar.[25] Citing *Shackleford*, the court stated that the judge should have foreseen that possible credibility problems with the witness could develop, raising the danger that the judge might alert the court members to his bias against the witness.[26]

Problems other than those recognized in *Shackelford* and *Wiggers* are often created when a disqualified judge continues to preside. One such problem is apparent in *United States v. Sherrod*. In that case, the military judge disclosed, inter alia, that he lived next door to the victims of one of the burglaries with which the accused was charged, and that his daughter was a close personal friend of the girl next door who was alleged to have been molested by the accused.[27] The accused properly challenged the military judge for cause. The judge erroneously denied the challenge[28] and added that he would not entertain a request for trial by judge alone.[29] Despite this, the accused requested a judge alone trial, preferring that his fate be decided by the next door neighbor rather than court members, due to the peculiar nature of the offenses.[30]

The military judge denied the judge alone request, based on the appearance of bias created by his status as a victim's neighbor as well as his concern that the accused feel he would receive a fair trial.[31] As a result of the disqualified judge remaining on the case, the accused was denied any meaningful choice of forum. Had another, qualified, judge made the decision on the judge alone request, it presumably would have been granted, especially given the judicial preference to grant such requests.[32] When *disqualified* judges make these decisions, however, they are not in the best position to protect the interests of the accused, as Congress intended.[33]

Other problems are created by allowing disqualified judges to remain on a case. One such problem is the burden this places on military judges themselves. Knowing that the option to remain on the case exists, a judge may feel pressure to continue rather than cause the administrative inconvenience necessary to obtain another judge. Even qualified judges must perform a difficult balancing act in giving guidance and important information to court members while at the same time avoiding the slightest appearance of partiality.[34] If the judge actually is biased, or at least appears

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[19] *See, e.g.*, United States v. Holland, 655 F.2d 44 (5th Cir. 1981); Potashnick v. Port City Construction, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); United States v. Brown, 539 F.2d 467 (5th Cir. 1976); *see also* United States v. Bray, 546 F.2d 851 (10th Cir. 1976). Unlike the military system, however, sentencing is done by the judge in the federal civilian sector, even where trial is by jury. *See* Fed. R. Crim. P. 32. Therefore, a stronger case could arguably be made for such an option in the military system, where both findings and sentence are determined by members, and a disqualified judge might have less effect on the proceedings.

[20] 2 M.J. 17 (C.M.A. 1976).

[21] *Id.* at 20.

[22] *Id.* at 19.

[23] 25 M.J. 587 (A.C.M.R. 1987).

[24] The court found that no prejudicial error remained as to findings because the convening authority had set aside the finding of guilty to the one contested offense.

[25] *Id.* at 589.

[26] Id. at 593. No such credibility problems with the witness actually arose during the trial. The court implied that this fact was irrelevant.

[27] *Sherrod*, 22 M.J. at 919.

[28] *Id.* at 923.

[29] *Id.* at 919

[30] The accused was charged, inter alia, with burglarizing the military quarters of two senior ranking officers at Fort Bragg, North Carolina, and assaulting two minor dependents. *Id.* at 918. The court members gave the maximum allowable sentence after finding the accused guilty of all charges and specifications. The Army court determined that the sentence was inappropriately severe. *Id.* at 923.

[31] *Id.* at 919.

[32] *See* United States v. Webster, 24 M.J. 96 (C.M.A. 1987); United States v. Butler, 14 M.J. 72 (C.M.A. 1982); *see also* R.C.M. 903(c)(2)(b) discussion, which states that "[a] timely request for trial by military judge alone should be granted unless there is a substantial reason why, in the interest of justice, the military judge should not sit as fact finder."

[33] *See* S. Rep. No. 1601, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4501, 4504.

[34] *See Shackelford*, 20 M.J. at 19.

biased, the task becomes much more difficult even for the disciplined judicial mind.

Another problem is the burden placed upon appellate authorities by allowing disqualified judges to remain on a case. Appellate counsel and courts must scrutinize every ruling made by the judge in an attempt to determine whether the ruling was in any way caused or affected by the bias or appearance of bias that formed the basis for disqualification. Prejudice will often be difficult or impossible to detect from the cold black and white of the record, though it may actually have existed. The judge's facial expressions, tone of voice, body language, and general demeanor are not reflected in the record. This silent communication between judge and jury can be outcome determinative in many cases.[35]

Finally, even though an accused may have actually received a fair trial from a disqualified judge and members, the public may not understand or believe that a disqualified judge can perform his or her duties fairly. After all, what is the point of calling a judge disqualified if he or she is still allowed to preside? The risk of losing public confidence in the administration of justice is especially great in the military, given the differences between the military and civilian communities and the ever present specter of command influence.[36]

The Solution

To avoid the problems discussed above, which result from allowing disqualified judges to direct trial by members and remain on the case, prejudice should be conclusively presumed whenever a disqualified judge presides. The concept of presumptive prejudice is not new. It has been applied when there has been an erroneous denial of a challenge for cause against a member of a court-martial.[37] Though such a rule would place strict liability on a military judge to make the right decision when the issue of disqualification arises, this burden is not too onerous when weighed against the alternatives. The law governing disqualification is not especially complex, and it is rare when military judges commit error in this area.

While requiring a new judge to preside may result in administrative inconvenience, any such inconvenience is far outweighed by the need to protect the dignity and integrity of the military justice system. Also, much appellate litigation could be avoided.

Conclusion

The case of *United States v. Sherrod*[38] was recently argued on appeal before the Court of Military Appeals. The presumptive prejudice rule, eliminating any option for disqualified military judges to remain on a case, was proposed to the court. Whether the court will adopt the rule remains to be seen.

[35] *See* Conner, *The Trial Judge, His Facial Expressions, Gestures and General Demeanor—Their Effect on the Administration of Justice*, 6 Am. Crim. L.Q. 175 (1968): *see also* United States v. Brown, 539 F.2d 467, 469 (5th Cir. 1976).

[36] *See* United States v. Butler, 14 M.J. 72, 74 (C.M.A. 1982) (Everett, C.J., concurring).

[37] *See* United States v. Lenoir, 13 M.J. 452, 453 (C.M.A. 1982).

[38] 22 M.J. 917 (A.M.C.R. 1986), *petition granted*, 24 M.J. 37 (C.M.A. 1987).

DAD Notes

Gross Errors: Hidden Attacks on Defense Counsel's Representation

In *United States v. Gross*,[1] the Army Court of Military Review recently reiterated its position that a new review and action is required when an accused questions the pretrial and in-court representation of his trial defense counsel while still represented post-trial by the same counsel. In *Gross*, the accused forwarded a letter to his defense counsel for inclusion in defense counsel's submissions pursuant to Rule for Courts-Martial 1105.[2] In his letter, the accused stated: "I had given my lawyer a list of my chain of command who I wish [sic] would speak on my behalf in court. He said he'd contact them. The day of court came and I had no defending witnesses."[3] In requiring a new review and action, the court relied on its previous holding in *United States v. Stith*.[4]

In *Stith*, the accused addressed a letter to the convening authority questioning the competence of his trial defense counsel. The staff judge advocate included the accused's comments in his post-trial review and served the review on the defense counsel. Defense counsel submitted no rebuttal. Under the circumstances, the court held that it was error for the staff judge advocate to serve his review upon accused's defense counsel.[5] The rationale of *Stith* was further explained in *United States v. Clark*.[6] In *Clark*, the staff judge advocate received a letter addressed to the convening authority from the accused after completion and service of his post-trial recommendation. The letter challenged the

[1] ACMR 8701456 (A.C.M.R. 13 Nov. 1987).

[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1105 [hereinafter R.C.M.].

[3] *Gross*, slip op. at 1 n.1.

[4] 5 M.J. 879 (A.C.M.R. 1978), petition denied, 7 M.J. 270 (C.M.A. 1979).

[5] *Id.* at 880.

[6] 22 M.J. 708 (A.C.M.R. 1986).

representation he had received from his trial defense counsel. On the same day that the staff judge advocate received this letter, the defense counsel submitted his response to the post-trial recommendation by requesting a substantial reduction in confinement.[7] At the time he responded, defense counsel was not aware of the accused's complaint to the convening authority. The court held that it was not error for the staff judge advocate to serve the recommendation on the accused's defense counsel. The court noted that the primary reason for not allowing the trial defense counsel to act on behalf of his client when his representation has been attacked is because counsel's interest in defending his reputation conflicts with his interest in representing his client. When the defense counsel becomes aware of the challenge to his performance after he responds, however, he is mentally free of the competing interests.[8]

In *Gross*, unlike *Stith* and *Clark*, the accused gave his letter directly to his defense counsel for submission to the convening authority. The letter consisted of five handwritten pages and did not appear to have been written specifically for the purpose of attacking the defense counsel's competence. In the first three pages, the accused explained the circumstances surrounding the offenses, including matters in extenuation. In the final two pages, he discussed the witnesses who testified at his court-martial and ended with a request to upgrade his discharge. The only criticism of the performance of his defense counsel was the three sentences quoted above by the court. The defense counsel appended the letter to his submission pursuant to R.C.M. 1105. In the submission, defense counsel requested that the accused's period of confinement be reduced. Although he referred to the letter once, he never addressed the accused's allegations.

Gross is noteworthy because it highlights a source of post-trial attack not normally considered by defense counsel. Defense counsel frequently receive letters from their clients for use in post-trial submissions. As this case demonstrates, attacks on the adequacy of their trial representation may not be readily apparent. The problem becomes more complicated if the client submits letters from third parties, especially family members, and these letters challenge the adequacy of defense counsel's representation. The question should then be addressed as to whether the client has adopted those assertions as his own. If he has, a conflict would then exist as to further post-trial representation. This is not to suggest that such oblique attacks occur only in these types of submissions. Congressional inquiries are another area where challenges to performance may arise. For instance, an accused's complaint to his congressional representative that certain inadmissible evidence was considered at his trial, evidence to which the defense counsel offered no objection, could arguably be construed as a post-trial attack on counsel's competency.[9]

Gross makes clear that the onus is on the defense counsel to be alert to these hidden attacks. Therefore, defense counsel should carefully scrutinize documents they include in their post-trial submissions and be alert to post-trial developments in the case. When there appears to be a direct or hidden attack, defense counsel should discuss it with the client in an attempt to resolve the matter. In resolving this question, defense counsel should, in accordance with *United States v. Clark*,[10] ask if he or she can be mentally free from competing interests at the time he or she discharges his or her post-trial responsibilities. Captain Timothy P. Riley.

Requests for Counsel to Foreign Officials: A Meaningless Endeavor?

In *United States v. Coleman*,[11] the Army Court of Military Review held that a request for counsel made during an interrogation by foreign investigators, that is later communicated to American officials by the foreign officials, fails to trigger the rule prescribed in *Edwards v. Arizona*.[12] Observing that the United States Constitution and court decisions interpreting it do not apply to actions of foreign officials, the court ruled that American law does not apply to a request for counsel made during an interrogation by German officials in a "German investigation."[13] The court therefore approved the initiation of an interrogation by an American investigator with *actual* knowledge that the suspect had previously requested counsel.

The facts in *Coleman* form an interesting *Edwards* issue. Coleman was taken to the German police station and was confronted by German authorities with the results of an autopsy done on his two-month-old daughter that revealed that the infant died of unnatural causes. He refused to make a written statement and requested an attorney. There were no American officials present at this interrogation except a Criminal Investigation Division (CID) employee who acted as an interpreter. The interrogation was immediately terminated and Coleman was transported by his unit to the CID office for questioning. The agent conducting the interview was aware that Coleman had made a request for counsel. In fact, because the agent knew that Coleman had requested an attorney, he sought advice from the CID legal advisor prior to conducting the interrogation. Coleman was given a complete advisement under Article 31.[14] He waived his rights and made a detailed written statement against his penal interest.[15]

In *Edwards v. Arizona*, the Supreme Court held that a person in custody who has "expressed his desire to deal

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[7] *Id.* at 709.

[8] *Id.* at 710.

[9] Other sources of attack include the appellate representation form (in which the accused is encouraged to assert errors) and complaints made to the Inspector General's Office. *See generally* Dep't of Army, Reg. No. 20–1, Inspections and Investigations—Inspector General Activities and Procedures (18 Sep. 1986).

[10] 22 M.J. at 710.

[11] 25 M.J. 679 (A.C.M.R. 1987).

[12] 451 U.S. 477 (1981).

[13] *Coleman*, 25 M.J. at 686–87.

[14] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982) [hereinafter UCMJ].

[15] *Coleman*, 25 M.J. at 682–83.

with the police only through counsel, is not subject to further interrogation by the authorities until the accused himself initiates further communication, exchanges, or conversations with the police."[16] In *Miranda v. Arizona*, the Court ruled "[i]f an individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[17] This includes requests made prior to or during the *Miranda* warnings.[18] The *Edwards* rule may apply even if the investigator that is conducting the interview knew nothing about the previous request for counsel and was acting in good faith, because knowledge of the invocation of the right to counsel may be imputed to all investigators working on the investigation.[19]

In *United States v. Vidal*,[20] however, the Court of Military Appeals observed that actions and knowledge of foreign officials are not generally imputed to American authorities in connection with the application of American constitutional guarantees because the investigators of a host country cannot be considered an extension of American investigative activity. Based on that observation, the court ruled that it would not impute a foreign investigator's knowledge of a suspect's request for counsel to an American investigator. The court further stated:

> Even if [CID Agent] Zwemke had been personally aware of the request for counsel made to German authorities, we do not believe that this knowledge would have precluded him from further questioning Vidal. . . . In short, we conclude that the requirements of *Edwards v. Arizona* are not triggered by a request for counsel made to a foreign official.[21]

The major difference between *Coleman* and *Vidal* is the interviewing investigator's knowledge of the prior invocation of counsel rights by the suspect. In *Vidal*, the court would have had to impute the knowledge of the prior invocation to the American investigator. In *Coleman*, the investigator knew of the prior invocation of the right to counsel by the suspect, but refused to honor it. The *Coleman* court applied the dicta of the *Vidal* decision, however, finding that *Edwards* is not triggered when a request for counsel is made to foreign officials.[22]

The *Coleman* opinion makes numerous references to cooperation between the German and American officials during the course of the investigation.[23] These include: the accompanying of two CID agents with the German investigator to search Coleman's residence; the holding by American agents of evidence seized in the search; the performance of an autopsy of the victim by a German pathologist and a U.S. military pathologist at a U.S. military medical facility; the use of a CID employee as an interpreter during the German interrogation; the transportation of Coleman and his wife to and from the German police station by American officials; the providing of a meal by the Americans to the Colemans while in German custody; and the referral of the investigation by the American investigator as a "joint investigation" throughout the investigation. The abundance of cooperation between the German and American officials was mandated by treaty,[24] and thus was not considered by the court to be a joint investigation.

The cooperation that exists between American and German officials is similar to the cooperation between federal and state officials that has been deemed to require an imputation of knowledge between officials.[25] While we may never go so far as to impute knowledge between foreign and American officials due to the differences in their judicial systems, "actual knowledge" of an invocation of the right to counsel requires close scrutiny. As the Supreme Court noted in *Michigan v. Jackson*, "[t]he simple fact that a defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly."[26] *Edwards* is based upon an understanding that an "assertion of the right to counsel [is] a significant event,"[27] and that additional safeguards are necessary when an accused asks for counsel.[28] Further, questioning after actual knowledge of a prior invocation of the right to counsel is in direct opposition to the *Edwards* rule.

The *Coleman* court reasons that because United States officials did not instigate, participate in, or conduct any part of the German interrogation, the constitutional guarantees are inapplicable to the German actions during the interrogation. Coleman's complaint does not concern the German actions, however. The Germans had identified Coleman as a "suspect" for the crime of "child abuse" prior to conducting the interview. Having been given the opportunity to remain silent and to consult an attorney prior to making a written statement, Coleman executed a form indicating he did not want to make a statement "at this time," and that he wanted to consult with an attorney first. The Germans

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[16] 451 U.S. at 484–85.

[17] 384 U.S. 486, 473–74 (1966).

[18] Smith v. Illinois, 469 U.S. 91 (1984). *But see* United States v. Goodson, 22 M.J. 22, 23 (C.M.A. 1986) ("Even if under some other circumstances a request for counsel made prior to the commencement of interrogation might not bring *Edwards v. Arizona, supra*, into play, we have no doubt that here appellant's requests had that effect.").

[19] United States v. Harris, 19 M.J. 331, 339 (C.M.A. 1985); United States v. Goodson, 22 M.J. 947 (A.C.M.R. 1986).

[20] 23 M.J. 319 (C.M.A. 1987).

[21] *Id.* at 323 (citation omitted).

[22] *Coleman*, 25 M.J. at 687.

[23] *Id.* at 682–83.

[24] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (date of entry into force with respect to the United States: Aug. 23, 1953).

[25] See United States v. Scalf, 708 F.2d 1540, 1544 (10th Cir. 1983); United States v. Downing, 665 F.2d 404 (1st Cir. 1981).

[26] 475 U.S. 625, 634 n.7 (1986) (citation omitted).

[27] Edwards v. Arizona, 451 U.S. at 485.

[28] *Id.* at 484.

thereafter ended the interrogation and released Coleman to the Americans. The American investigator, with actual knowledge of the prior invocation, proceeded to interview Coleman. It is therefore the American investigator's actions that are the subject of Coleman's complaints.

One might argue that Coleman did not have a right to counsel when he first expressed his desire for one, and that the invocation of his right was therefore meaningless. It is obvious from the facts, however, that the invocation of the right was meaningful under German law as the Germans ceased all questioning at that point. The Americans, working so closely with the Germans on the investigation that they had actual knowledge of the request for counsel, should also be required to acknowledge it. The close cooperation and coordination between officials of different governments required by treaty may itself be sufficient reason to effectuate the accused's invocation. The *Coleman* court expressed a concern that such a result would invite "ignorance" by our police officials, and encourage subterfuge to ensure that ignorance. Under such circumstances, perhaps imputation of knowledge may become necessary. Those are not the facts in *Coleman,* however. The investigator had actual knowledge of Coleman's request for counsel and failed to honor it.

The *Vidal* and *Coleman* opinions require a layman to make a distinction between his rights before a foreign government and his rights under the Constitution. In fact, the *Vidal* court bases its dicta, in part, on the speculation that an American suspect's unfamiliarity with a foreign legal system may have been the reason that he was unwilling to speak to investigators without assistance of counsel.[29] Such speculation fails to take into consideration the purpose of the "bright-line" *Edwards* rule—elimination of the coerciveness of a government-initiated custodial interrogation after a suspect has invoked his right to counsel.

This issue lends an interesting twist to the *Edwards* test that may need to be answered by the Supreme Court. Counsel in the field are encouraged to continue to litigate this issue. Continue to place in the record evidence of the cooperation between the governmental entities, even if it does not appear to amount to a joint investigation. In so doing, the future outcome of this question may be answered differently. Captain David C. Hoffman.

Litigating Pretrial Confinement/Restriction Issues: *New* Counting Is Now Old

The importance of litigating pretrial confinement or restriction issues cannot be overemphasized. Often, especially in guilty plea cases, this area provides the only litigable issue at trial in which defense counsel can gain relief for the client. The "raise it or waive it" rule has applied since *United States v. Ecoffey.*[30] Computation of time and the specific conditions in which the soldier was detained are the critical factors.

Computation of time was the issue in *United States v. New.*[31] The Army Court of Military Review found that New was entitled to two-for-one credit for pretrial restriction based on *United States v. Mason*[32] and Rule for Courts-Martial 305(k). The *New* court also held that, for purposes of determining credit for pretrial restriction under *Mason* and R.C.M. 305(k), the first day of restriction tantamount to confinement is not to be counted, but the last day is.[33]

Recently, the Army Court of Military Review, in *United States v. DeLoatch,*[34] reinterpreted the method for computation of time under R.C.M. 305(k). The court held that the military judge had erred as a matter of law in determining that actual confinement in a "D-Cell" and at the Philadelphia Naval Brig did not constitute confinement within R.C.M. 305. The military judge did, however, rule that such confinement came within the *Allen* credit.[35]

In *DeLoatch,* the court disagreed with the *New* method of computation, stating: "Our reading of the R.C.M. 305 analysis . . . leads us to the conclusion that both the day confinement is imposed and the day of review by the magistrate are counted as days of confinement in determining if review by the magistrate was within seven days."[36] *DeLoatch,* however, did not specifically overrule *New.*[37] Nevertheless, defense counsel should be able to persuasively argue that the military judge should rely on *DeLoatch* because it is the more recent decision. Ensuring that a client receives all possible credit for his or her pretrial confinement or restriction tantamount to confinement, down to the day, gives real relief to the client. Captain Kevin T. Lonergan.

The "McBurton" Demand Rule—Fast Food on the Speedy Trial Menu

The law of speedy trial in the military is complex. Until recently, there have been not less than five separate speedy trial rules to contend with.[38] The Army Court of Military Review has now added a new rule. In *United States v. McCallister,*[39] the court applied the four part "functional

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[29] United States v. Vidal, 24 M.J. at 323.

[30] 23 M.J. 629 (A.C.M.R. 1986); *see also* United States v. Howard, 25 M.J. 533 (A.C.M.R. 1987), which suggests *Gregory* credit may be waived if not raised at trial, and United States v. Gregory, 21 M.J. 952 (A.C.M.R. 1985), *aff'd,* 23 M.J. 246 (C.M.A. 1986) (summary disposition).

[31] 23 M.J. 889 (A.C.M.R. 1987).

[32] 19 M.J. 274, 274 n.* (C.M.A. 1985) (summary disposition).

[33] 23 M.J. at 891.

[34] ACMR 8700666 (24 Dec. 1987).

[35] United States v. Allen, 12 M.J. 126 (C.M.A. 1984).

[36] *DeLoatch,* slip op. at 2 n.2; *see generally* Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice para. 9-5 (1 July 1984).

[37] *DeLoatch,* slip op. at 3 n.2.

[38] The five rules are: the sixth amendment requirement; the 90 day rule and the demand rule from United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971); and the 120 and 90 day rules from R.C.M. 707(a) and (d), respectively.

[39] 24 M.J. 881 (A.C.M.R. 1987).

analysis" from *Barker v. Wingo*[40] to the demand rule found in *United States v. Burton*,[41] in effect creating a new hybrid rule.

McCallister was kept in pretrial confinement under arguably illegal conditions for eighty-three days after twice demanding a speedy trial. The government did not respond to the demands. Under these facts, the Army court applied the new rule and found that the government had proceeded with due diligence.[42] In his dissenting opinion, Senior Judge Raby criticized the court's election to apply the *Barker v. Wingo* balancing test to the *Burton* "demand" rule.[43] Such a procedure, he argued, destroys the intended viability of the demand rule by replacing it, in effect, with the *Barker* analysis.[44]

Defense counsel should continue to demand speedy trial when appropriate. In view of existing precedent from the Court of Military Appeals,[45] and the strong dissent by Judge Raby, there is a fair chance that *McCallister* may be heard again on appeal.[46] Captain William E. Slade.

Production of a Defense Psychiatric Witness: It's Never Too Late (Usually)

In *United States v. Walker*,[47] the Army Court of Military Review recently analyzed Rule for Courts-Martial 701(b)(2)[48] and held that the accused should have been permitted to present expert psychiatric testimony in his case-in-chief despite his failure to inform trial counsel until after motions were litigated. The court reversed the trial judge's ruling that the defense should have notified the government of the expert witness "approximately five weeks earlier when motions were litigated,"[49] and held that as long as "reasonable notice [was] given,"[50] the accused should be permitted to raise an insanity defense through expert testimony.

Essentially, the Army court found that the trial judge abused his discretion by unconstitutionally denying Captain Walker his "military due process" and sixth amendment rights to "the production of witnesses whose testimony is relevant and necessary."[51] The military judge erred by construing R.C.M. 701(b)(2) in light of its civilian counterpart, Federal Rule of Criminal Procedure 12.2(b).[52] The court held it was error to interpret the language of R.C.M. 701(b)(2) in such a narrow fashion as to effectively override the Presidential intent of that rule.[53] Because of this error, the findings of guilty and the sentence were set aside.[54]

Trial defense counsel should be confident in giving *reasonable* notice of an expert psychiatric witness no matter how close to the trial date one discovers the evidence. The Army court has signaled its intention to ensure that notice requirements more stringent than those of R.C.M. 701(b)(2) should not foreclose a valid defense when measured against an accused's due process rights. Trial judges should only consider exclusion of expert testimony as a "last resort which should be undertaken only in the most extreme circumstances *and upon special findings supported by the evidence of record.*"[55] Therefore, trial defense counsel now have case precedent supporting the presentation of a lack of mental responsibility defense, even though the evidence was discovered only shortly before trial, provided reasonable advance notice still can be given to the government. Captain Brian D. DiGiacomo.

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[40] 407 U.S. 514 (1972). (The *Barker* speedy trial analysis involves examination of the length of delay, the reasons for the delay, specific prejudice to the accused, and the accused's assertion of his right to speedy trial.).

[41] 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[42] *Id.* at 892.

[43] *Id.* at 893 (Raby, J., dissenting).

[44] *Id.*

[45] *See, e.g.*, United States v. Harvey, 23 M.J. 280 (C.M.A. 1986); United States v. Johnson, 1 M.J. 101 (C.M.A. 1975).

[46] The Supplement to Petition for Grant of Review was filed in October 1987.

[47] CM 448099 (A.C.M.R. 23 Dec. 1987).

[48] R.C.M. 701 provides that "[i]f the defense intends to rely upon the defense of lack of mental responsibility or to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the guilt of the accused, the defense shall, *before the beginning of trial on the merits*, notify the trial counsel of such an intention." (emphasis added).

[49] *Walker*, slip op. at 4. Defense counsel notified trial counsel on 22 July 1985 at an Article 39a session. The trial on the merits was scheduled to begin two days later.

[50] *Id.* at 7.

[51] *Id.* at 6 (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982); R.C.M. 703(b)(1); Mil. R. Evid. 401; United States v. Coffin, 25 M.J. 32, 34 (C.M.A. 1987); United States v. Brooks, 25 M.J. 175, 180 (C.M.A. 1987)).

[52] Fed. R. Crim. P. 12.2(b) provides that a defendant who intends to introduce expert testimony relating to his mental condition, "shall, within the time provided for the filing of pretrial motions . . . notify the attorney for the government."

[53] *Walker*, slip op. at 7. The court focused on the fact that the plain language of R.C.M. 701 needed no further interpretation. *Id.* (citing United States v. Williams, 23 M.J. 362, 366 (C.M.A. 1987)).

[54] *Walker*, slip op. at 8.

[55] *Id.* at 7 n.6 (emphasis added). Such an "extreme case" would probably entail bad faith on the part of trial defense counsel or a "demonstrable and substantial prejudice to the opposing counsel's orderly presentation of the case." *Id.* at 8 (quoting United States v. Townsend, 23 M.J. 848, 851 (A.F.C.M.R. 1987)).

Who's in Charge? [56]

The officer who holds the status of convening authority wields enormous power with regard to the military accused. [57] Recently, the Court of Military Appeals and the Army Court of Military Review have issued four opinions on the issue whether one properly acted as convening authority. At first glance these opinions may appear to be inconsistent; they can be reconciled, but produce an awkward rule of law.

In *United States v. Jette,* [58] a case involving a special court-martial, the Court of Military Appeals recognized that Congress has expressly determined that the commanders of certain tactical military units will be convening authorities by virtue of their position, while in other situations Congress has expressly delegated the authority to designate convening authorities to the President or the Secretary concerned. [59] Specifically, the court stated, "Article 23(a)(4), unlike Article 23(a)(7), reflects Congress' concern for the realities of command, not the intricate dictates of service regulations." [60] In *Jette,* Colonel (COL) Kimball, the support group commander, was the officer intended by Congress pursuant to Article 23(a)(4) to be the convening authority when he was present. [61] During COL Kimball's temporary absence, COL Fermrite was appointed acting commander. [62] When COL Kimball returned from his absence, he resumed his duties as commander, which included excusing one court member, appointing a new member, and approving findings and sentence in a court-martial. An order announcing COL Kimball's re-assumption of command was not prepared until well after he took the above-mentioned actions, however. [63] The Court of Military Appeals found that, despite the administrative oversight that neglected to make COL Kimball appear to be the commander on paper, he was in fact properly acting as the commander and was, therefore, entitled to act as convening authority pursuant to Article 23(a)(4). The court reversed an Air Force Court of Military Review decision that held that the actions taken by COL Kimball as convening authority, prior to the order announcing his assumption of command, were invalid. [64]

Soon after the *Jette* opinion, the Army Court of Military Review issued an opinion in *United States v. Yates.* [65] In *Yates,* COL McRee, the commander of Fort Sheridan, referred charges against an officer to a general court-martial that included officers junior to the accused. [66] In COL McRee's absence, Lieutenant Colonel (LTC) Junio, the deputy post commander, amended the convening orders by removing the junior officers and detailing additional senior officers. [67] LTC Junio was not the most senior officer present for duty at Fort Sheridan, however. Rather, LTC Cofield, who was one of the newly-appointed court members, was the most senior officer. [68] The court-martial convicted and sentenced the accused and COL McRee approved the findings and sentence. [69] The Army Court of Military Review held that, "Unlike the situation in *United States v. Jette* . . . the failure to comply with 'intricate dictates of service regulations' will defeat jurisdiction, since it is by means of service regulations that the [installation] commander, and one assuming command in his absence, have authority to convene general courts-martial." [70] The court went on to hold that the failure to properly detail court members was a jurisdictional error and set aside the findings and sentence. [71]

Not long after the *Yates* opinion, the Army Court of Military Review, in *United States v. Wakeman,* [72] addressed a situation where the acting corps commander was not the most senior general officer present for duty within the corps, and his accession to command was not approved in accordance with regulations. [73] The court held that because this general officer who acted as convening authority was recognized throughout the corps as the acting corps commander by both his superiors and subordinates, he could

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[56] In the moments following the assassination attempt by John Hinckley on President Reagan, then Secretary of State Alexander Haig stated: "Constitutionally, gentlemen, you have the President, the Vice President and the Secretary of State in that order and should the President decide he wants to transfer the helm to the Vice President, he will do so. He has not done that. As of now, I am in control here, in the White House, pending return of the Vice President." *Six Shots at a Nation's Heart,* Time Mag., Apr. 13, 1981, at 24. Have the military courts adopted a "command by appearance" doctrine regarding who may act as convening authority in some cases? This Note addresses that question.

[57] *See* UCMJ arts. 22, 23, 25, 34, and 60.

[58] 25 M.J. 16 (C.M.A. 1987).

[59] *Id.* at 18.

[60] *Id.* at 19. Articles 22 and 23 were recently amended to include the Secretary of Defense and commanders of joint commands as convening authorities. Thus citation to the specific provisions of Articles 22 and 23 should be verified. *See* Department of Defense Reorganization Act, Pub. L. No. 99-433, tit. II § 211(b), 100 Stat. 1017 (Oct. 1, 1986) (effective June 1, 1987).

[61] 25 M.J. at 17.

[62] *Id.*

[63] *Id.* at 17-18.

[64] *Id.* at 19.

[65] 25 M.J. 582 (A.C.M.R. 1987), *certificate for review filed,* Dkt No. 59231/AR (C.M.A. Nov. 19, 1987).

[66] *Id.* at 583.

[67] *Id.*

[68] *Id. See* Dep't of Army, Reg. No. 600-20, Personnel—General—Army Command Policy and Procedures, paras. 3-3c and 3-4a (20 Aug. 1986) [hereinafter AR 600-20].

[69] 25 M.J. at 583.

[70] *Id.* at 584. *See* Gen. orders No. 3, HQ, Dep't of Army (19 Jan. 1981) (designating the commanding officer of Fort Sheridan as the general court-martial convening authority for Fort Sheridan).

[71] *Id.* at 585.

[72] 25 M.J. 644 (A.C.M.R. 1987).

[73] *See* AR 600-20, para. 3-3c.

legally act as convening authority.[74] Compare the court's reasoning in *Wakeman* to that expressed in *United States v. Harrington.*[75] In *Harrington,* the court held that a deputy post commander could not act as convening authority because he was not the most senior officer present for duty and his accession to command was not pre-approved by the proper higher command in accordance with regulations.[76]

Although the outcome in *Jette* seems correct under the specific facts of the case, its language places great emphasis on the appearance of command.[77] It is doubtful that Congress intended a less senior officer to accede to command, and thus gain the status of convening authority, based solely on appearances. Nonetheless, the opinion in *Wakeman* turns on the fact that a less senior officer appeared to be in command and no other officers challenged his claim to command. *Jette* also indicates, however, that convening authority status, based on the appearance or fact of command, is limited to those military units specifically recognized by Congress and not to commanding officers empowered by the Secretary concerned.[78] Thus the holding in *Yates, Harrington,* and *Wakeman* can be viewed as consistent with *Jette.* This analysis leads to the awkward conclusion that the status of a convening authority of a congressionally recognized unit, such as an army, a corps, a division, or a separate brigade,[79] turns on the appearance of command, as held in *Jette* and *Wakeman,* while the status of a convening authority requiring Secretarial designation, such as a post or garrison in the general court-martial situation, turns on service regulations, as held in *Yates* and *Harrington.*[80] Therefore, defense counsel in commands recognized by Article 22(a)(3) must specifically challenge the status of a convening authority whose assumption of command is not in compliance with service regulations. Captain Scott A. Hancock.

[74] 25 M.J. at 645. *Cf.* United States v. Williams, 6 C.M.A. 243, 19 C.M.R. 369 (1955) (deputy corps commander lawfully acted as convening authority in absence of corps commander because he was next senior regularly assigned officer present for duty in compliance with regulation).

[75] 23 M.J. 788 (A.C.M.R. 1987).

[76] *Id.* at 791 (citing AR 600–20, paras. 3–3*b*, 3–3*c*, and 3–4*a*).

[77] *Jette,* 25 M.J. at 18–19 (Everett, C.J. concurring).

[78] *See, e.g.,* Gen. Orders Nos. 3, 10 and 15 HQ, Dep't of Army (19 Jan. 1981, 9 April 1981, and 22 June 1981, respectively).

[79] UCMJ art. 22(a)(3).

[80] This conclusion is a way to reconcile the court decisions discussed herein. The provisions of Article 23(a)(2) must be mentioned, however. Under *Jette* it appears that Article 23(a)(7) stands apart from the other subparagraphs of Article 23(a). Article 23(a)(4) is closely akin to Article 23(a)(2). If the situation in *Jette,* arising under Article 23(a)(4), did not cause a jurisdictional defect, then presumably a similar situation arising under Article 23(a)(2) also would not result in a jurisdictional deficiency. Thus, *Yates* and *Harrington* would probably have been decided differently if they had arisen in the special court-martial context, in which the units or commands involved would be specifically recognized by Congress by way of Article 23(a)(2).

Trial Judiciary Note

Sentencing Evidence

Lieutenant Colonel Patrick P. Brown
Military Judge, Sixth Judicial Circuit, Korea

Once an accused has been found guilty of an offense by a court-martial, what evidence can the court consider in determining an appropriate sentence? The military courts have long held that any punishment must be individualized to the particular offender being sentenced.[1] Indeed, one case notes that the "purpose of the presentencing portion of a court-martial is to present evidence of the relative 'badness' and 'goodness' of the accused as the primary steps toward assessing an *appropriate* sentence."[2]

While insisting that the punishment must fit the offender, and not just the offense, the military has recognized several legitimate goals of the sentencing process. Among these goals are deterrence, punishment, and rehabilitation of the offender; protection of society; maintenance of good order and discipline within the military; and deterrence of other potential offenders.[3] Counsel may argue and, if requested, the military judge should instruct the court members on these principles.[4] This may raise the legitimate concern expressed by the Court of Military Appeals in *United States v.*

[1] United States v. Mamaluy, 10 C.M.A. 102, 106, 27 C.M.R. 176, 180 (1959) ("accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment").

[2] United States v. Martin, 20 M.J. 227, 230 n.4 (C.M.A. 1985).

[3] United States v. Lania, 9 M.J. 100 (C.M.A. 1980); United States v. Wright, 20 M.J. 518 (A.C.M.R.), *petition denied,* 21 M.J. 309 (C.M.A. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984); Dep't of Army, Pamphlet No. 27–9, Military Judges' Benchbook, para. 2–59 (1 May 1982); *see* Vowell, *To Determine an Appropriate Sentence; Sentencing in the Military Justice System,* 114 Mil. L. Rev. 87 (1986).

[4] *See* United States v. Lania, 9 M.J. 100 (C.M.A. 1980); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(g) [hereinafter R.C.M.].

Hill[5] and *United States v. Mosely*[6] that the sentencing authority will base the punishment on matters not in evidence and not relevant to the accused; in short, on material that is hidden from the accused and not subject to rebuttal. The answer to this concern is to allow the introduction of evidence that will justify the application of the various principles and support an appropriate sentence to carry out these goals.[7] As the Air Force Court of Military Review has recognized. "[at] best, sentencing is a deliberative, thoughtful process and not a science. It follows therefore that the sentencing authority should be given as much relevant information as is available and admissible to guide him or her in the sentencing task."[8]

Rule for Courts-Martial 1001 may be authority for the admissibility of such evidence on sentencing. The drafters' analysis of the rule suggests that its intent is to allow the military much the same information as would be provided by a presentence report in a civilian court.[9] Rule for Courts-Martial 1001(a)(1)(A) lists five different categories of evidence that the prosecution may present "to aid the court-martial in determining an appropriate sentence," and R.C.M. 1001(b) discusses each category separately. The two broadest categories are R.C.M. 1001(b)(4) and (5), which allow "evidence of aggravation" and "evidence of rehabilitative potential." The admissibility of evidence of aggravation was also recognized in the 1969 Manual for Courts-Martial,[10] and has been interpreted as including only evidence that is directly related to the offenses of which the accused has been convicted. This is codified in R.C.M. 1001(b)(4), which refers to "aggravating circumstances directly relating to or resulting from the offenses."

The provision that admits the widest range of personal information concerning the accused is R.C.M. 1001(a)(1)(A)(v), and refers to "evidence of rehabilitative potential." This provision is new with the 1984 Manual. The Army Court of Military Review in *United States v. Wright*[11] and *United States v. Pooler*[12] affirmed the admissibility of evidence of the accused's attitude toward offenses similar to the ones of which he had been convicted. Although the court discussed this as aggravation evidence allowable by paragraph 75 of the 1969 Manual, the evidence was determined to be admissible to allow "a proper assessment of appellant's rehabilitative potential with respect to his present offenses."[13] In *United States v. Warren,*[14] the trial counsel argued on sentencing that the sentence imposed should teach the accused that he could not come into court and lie under oath. The Court of Military Appeals affirmed, reasoning that the accused's lying under oath might tend "to refute claims of his repentance and readiness for rehabilitation,"[15] and such perjury "is a proper consideration in determining an accused's *rehabilitative potential.*"[16] Similarly, the Navy-Marine Corps Court of Military Review, in *United States v. Chapman,*[17] agreed with the trial judge that the accused's voluntary and unauthorized absence from his own sentencing proceedings was "highly relevant to *rehabilitative potential.*"[18] Obviously, the courts have been receptive to evidence relevant to the accused's "rehabilitative potential," even to the point of considering factors not clearly within the meaning of "matters in aggravation."

Nevertheless, the courts have not grasped this new rule with open arms. In *United States v. Berger,*[19] the Air Force Court of Military Review disagreed with the trial judge's liberal interpretation of sentencing evidence admissibility. The accused had pled guilty to indecent acts with a minor. In aggravation, the trial counsel offered the testimony of a different minor that the accused had committed even more serious acts of indecency with her. The Air Force court held that "[n]ot everything is admissible in the presentencing proceedings,"[20] and this was not evidence in aggravation because it was not directly related to the present offenses. Assuming that it might have some slight bearing on the accused's rehabilitative prospects, it was not properly admitted because R.C.M. 1001(b)(5) "only permits *opinion* evidence, not evidence of specific instances of uncharged misconduct."[21] Similarly, in *United States v.*

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[5] 21 C.M.A. 203, 44 C.M.R. 257 (1972).

[6] 1 M.J. 350 (C.M.A. 1976).

[7] The defense counsel can be depended upon to present as much favorable evidence as possible, and to strongly oppose, within the limits of ethically arguable legal theories, any and all unfavorable evidence. The prosecution, therefore, will be the more likely source of detailed evidence to guide the court in its sentencing. This is entirely appropriate because the "burden [is] on the Government to not only prove the guilt of the accused beyond a reasonable doubt but to establish that he should receive some punishment." United States v. Wilson, 35 C.M.R. 576, 578 (A.B.R. 1965).

[8] United States v. Slovacek, 21 M.J. 538, 540 (A.F.C.M.R. 1985), *aff'd,* 24 M.J. 140 (C.M.A. 1987); *see also* United States v. Kirby, 16 C.M.A. 517, 37 C.M.R. 137 (1967). Consider the federal statutory provision, in 18 U.S.C. § 3661 (1982): "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This provision does not apply, however, to trials by court-martial.

[9] R.C.M. 1001 analysis. The Court of Military Appeals has suggested that "the information about an accused contained in his service record and presented to the military judge or court members for sentencing purposes may be more detailed than that which a probation officer can obtain about a civilian defendant." United States v. Warren, 13 M.J. 278, 284 n.7 (C.M.A. 1982).

[10] Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter MCM, 1969].

[11] 20 M.J. 518 (A.C.M.R.), *petition denied,* 21 M.J. 309 (C.M.A. 1985).

[12] 18 M.J. 832 (A.C.M.R. 1984).

[13] *Wright,* 20 M.J. at 521.

[14] 13 M.J. 278 (C.M.A. 1982).

[15] *Id.* at 284.

[16] *Id.* at 285 n.8 (emphasis added).

[17] 20 M.J. 717 (N.M.C.M.R.), *petition granted,* 21 M.J. 306 (C.M.A. 1985).

[18] *Id.* at 718 (emphasis added).

[19] 23 M.J. 612 (A.F.C.M.R. 1986).

[20] *Id.* at 614.

[21] *Id.* at 615 (emphasis added).

Lawrence,[22] the Army Court of Military Review applied a restrictive reading to the admissibility of evidence of rehabilitative potential. The trial judge had allowed into evidence a prior statement by the accused. In holding that this was error (though harmless) the court ruled that "while we recognize that RCM 1001(b)(5) represents a new dimension in presentencing procedure, we cannot construe its language or the Drafters' Analysis associated with it as contemplating more than the introduction of opinion evidence . . . relative to an accused's duty performance and potential for rehabilitation."[23] Because the prior statement was not a statement of opinion, its admission on sentencing was error.

The analysis of this particular rule can be read to support these two decisions by the courts of review. The analysis acknowledges that this provision is new, and allows the introduction of opinion testimony, and continues: "Note that inquiry into specific instances of conduct is not permitted on direct examination but may be made on cross-examination."[24] Although the drafters' intent is relevant, the general rule in interpreting any statute is that the language of the statute itself is controlling. If the drafters failed to properly incorporate their intent into the law, then their intent is of no particular value in determining the effect of that law. In this case, however, the law and the statement of the drafters' intent agree: nothing more than opinion evidence is permitted *under R.C.M. 1001(b)(5).*

A more interesting question, answered by examining the rule, not the analysis, is whether any evidence is *prohibited* by R.C.M. 1001(b)(5). The simple answer is "no." The rule is a statement of admissibility of opinion evidence, not a statement of exclusion of non-opinion evidence.

The military courts have ruled in other evidentiary areas that certain rules were rules of admission and not exclusion. For example, paragraph 153*a* of the 1969 Manual provided that an out-of-court identification could be admitted to corroborate an in-court identification. In *United States v. Burge,*[25] the military judge admitted the victim's out-of-court identification of the accused as an excited utterance even though he could not make an in-court identification. The Court of Military Appeals affirmed, holding that the rule was a rule of admission and not a rule of exclusion, and thus it did not specifically exclude such evidence, even though there was no in-court identification.[26] Similarly, in *United States v. Vickers,*[27] the court concluded that the courts of military review had read an unnecessary restriction into the language of the 1969 Manual. Paragraph 75*b* provided that the prosecution could introduce aggravation evidence after a plea of guilty where the evidence was not introduced before the findings. Several courts of military review had held that the "obverse implication" of this rule was that such evidence was prohibited after a finding of guilty in a contested case.[28] In *Vickers,* the court ruled that the rule was intended to allow evidence to be admitted, not to keep evidence out. The same reasoning logically applies to the provisions of R.C.M. 1001(b)(5).

Rule for Courts-Martial 1001(b)(5) does *not,* by its terms, exclude any evidence. If "the sentencing authority should receive full information concerning the accused's life and characteristics in order to arrive at a sentence which will be appropriate in light of the purposes for which a sentence is imposed,"[29] then this rule should not be used to exclude otherwise relevant evidence that would assist the sentencing authority in determining such an appropriate sentence.

The above language is somewhat echoed in *United States v. Martin,*[30] where the court set out a methodology for determining the admissibility of sentencing evidence: "first, . . . determine if the evidence tends to prove or disprove the existence of a fact or facts permitted by the sentencing rules."[31] If so, and if it is admissible under the Military Rules of Evidence, then it is admissible. This potentially opens the door to extremely broad categories of evidence. Under R.C.M. 1001(g), the trial counsel is allowed to argue that the court-martial should consider "general deterrence . . . and social retribution" in arriving at an appropriate sentence, as well as rehabilitation and specific deterrence. If counsel intends to argue such principles, there should be some evidence on which the court can base the application of the principles, or the concerns expressed by the Court of Military Appeals will be realized.[32] Evidence as to the proper application of "social retribution" can frequently be admitted as evidence in aggravation, as this allows victim impact evidence. What evidence justifies the application of "general deterrence"? Such evidence might logically include evidence as to the frequent commission of similar crimes, so that the court can determine a need to deter others, as well as the general social cost of the commission of such crimes, so as to weight the value of such deterrence. In case of a crime for profit, such as larceny, the gain realized not only by the accused, but by the average thief within the general community, may be relevant to determine how much punishment is necessary to deter such crimes, and to balance the present accused's punishment against the maximum that could be adjudged. Such evidence may also be relevant to determine the degree of social abhorrence and thus social retribution that is appropriate for the particular offenses under consideration by the court.

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[22] 22 M.J. 846 (A.C.M.R. 1986).

[23] *Id.* at 848 (footnotes omitted).

[24] R.C.M. 1001(b)(5) analysis.

[25] 1 M.J. 408 (C.M.A. 1976).

[26] This interpretation of the out-of-court identification evidence rule was not original with the court. *See* United States v. Grant, 3 C.M.R. 628 (A.F.B.R. 1952), involving a child sex victim and identification as a spontaneous exclamation.

[27] 13 M.J. 403 (C.M.A. 1982).

[28] United States v. White, 4 M.J. 628 (A.F.C.M.R. 1977); United States v. Taliaferro, 2 M.J. 397 (A.C.M.R. 1975); *cf.* United States v. Allen, 21 C.M.R. 609 (C.G.B.R. 1956).

[29] United States v. Mack, 9 M.J. 300, 316 (C.M.A. 1980).

[30] 20 M.J. 227 (C.M.A. 1985).

[31] *Id.* at 230 n.5.

[32] *See supra* text accompanying notes 5–6.

What, then, is the correct guidance for the determination of admissibility of evidence "to aid the court-martial in determining an appropriate sentence"? The courts of review in *United States v. Chapman*[33] and *United States v. Slovacek*[34] actually had the correct attitude: if it is not expressly excluded by the Manual, and if it is relevant, it is admissible.[35] This, of course, raises the dreaded specter of uncharged misconduct. As the court indicated in *Martin*, once the accused has been convicted of a crime, the problem associated with such evidence is greatly lessened. There is, in effect, no longer the risk of a "conviction of an accused for a specific crime because he generally has the reputation of being a 'bad man.' "[36] Nevertheless, Mil. R. Evid. 403 does limit the admissibility of relevant evidence on sentencing, just as it does on the merits.[37] Even during the sentencing phase of the trial, the government "may not introduce such bad-character evidence to show that the accused as a repeated offender deserves a severe punishment."[38] But if the evidence is otherwise relevant to one of the accepted principles of sentencing, then the fact that it shows the accused to be a repeated offender should not automatically cause it to be excluded.[39] The court expressed its concern in *United States v. Gambini* "that such evidence has a strong 'tendency to arouse undue prejudice' in the court against an accused, 'confuse and distract' the court from the issues before it, 'engender time-consuming side issues and . . . create a risk of unfair surprise.' "[40]

These considerations must be balanced by the military judge under Mil. R. Evid. 403. The ability of the judge to perform this balancing should be no more suspect during the sentencing phase than during the guilt determination phase. The answer to these concerns was also well expressed by the court in *United States v. Mack*: "[w]e believe that court members acting under proper instructions from a military judge, can limit their consideration of such [evidence] to their permissible purpose of assistance in the formulation of an appropriate sentence for the particular accused."[41] Finally, as the court noted in *Warren*, any risk that the court members might attach undue significance to such evidence "is more than neutralized by the unique sentence review available in military justice. The convening authority . . . and the Court of Military Review can grant relief by reducing the sentence if it appears that excessive weight was given by the sentencing authority [to such evidence.]"[42]

When a party objects that the evidence is not allowed by R.C.M. 1001 and therefore should be excluded, the military judge should "not read the Manual provision as so limiting, for it clearly by its terms does not *exclude* [evidence] which *otherwise* qualif[ies] for admission under one of the recognized [evidentiary rules.]"[43] Rather, if the proponent can establish that the evidence is relevant to any accepted principle of sentencing, and to the determination of an appropriate sentence for the accused, the inclination should be to let the sentencing authority consider the evidence. If the evidence can properly satisfy the various balancing considerations of Mil. R. Evid. 403, and if there is nothing in "the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces"[44] that would require its exclusion, then it should be allowed to contribute to the informed determination of an individualized, appropriate sentence.

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[33] 20 M.J. 717 (N.M.C.M.R.), *petition granted*, 21 M.J. 306 (C.M.A. 1985).

[34] 21 M.J. 538 (A.F.C.M.R. 1985), *aff'd*, 24 M.J. 140 (C.M.A. 1987).

[35] Mil R. Evid. 402 establishes general limits on the admissibility of relevant evidence, and includes not only Manual exclusionary rules but the Military Rules of Evidence, the Constitution, and other statutes as well.

[36] 20 M.J. at 229 n.3.

[37] *Id.* at 230 n.5.

[38] United States v. Gambini, 13 M.J. 423, 427 (C.M.A., 1982). The average lay person is likely to consider such a statement as devoid of common sense. The majority of civilian jurisdictions have habitual criminal or recidivist statutes allowing increased punishment based on repeated convictions. *Cf.* 21 U.S.C. § 962 (1982). If nothing else, a repeated offender has established a higher likelihood of his danger to society, thereby more certainly justifying sequestration from society as a punishment. The statement is also contrary to long-standing military law, because prior convictions have been admissible to justify increased punishment since at least 1951. *See* Manual for Courts-Martial, United States, 1951, para. 127c (Table of Maximum Punishments Section B); MCM, 1969, para. 127c (Table of Maximum Punishments Section B); R.C.M. 1003(d).

[39] *See* United States v. Warren, 13 M.J. 278 (C.M.A. 1982); United States v. Wright, 20 M.J. 518 (A.C.M.R.), *petition denied*, 21 M.J. 309 (C.M.A. 1985).

[40] 13 M.J. at 427 (quoting McCormick's Handbook on the Law of Evidence § 186 (2d ed. 1972)).

[41] 9 M.J. 300, 319 (C.M.A. 1980).

[42] 13 M.J. 278, 284 (C.M.A. 1982).

[43] United States v. Burge, 1 M.J. 408, 411 (C.M.A. 1976).

[44] Mil. R. Evid. 402

Defense Counsel's Guide to Competency to Stand Trial

Captain Margaret A. McDevitt
Fort Sill Field Office, U.S. Army Trial Defense Service

Introduction

In the defense counsel's concern for litigating the merits of a case, the issue of competency should not be overlooked. An accused must be competent to stand trial. The Supreme Court in *Dusky v. United States*[1] listed its criteria for determining competence to stand trial. The accused must be able to consult with his lawyer with a reasonable degree of rational understanding, have a rational understanding of the proceedings against him, and must have a factual understanding of these proceedings.[2] In *Drope v. Missouri*,[3] the Court added that the accused must be able to assist in his or her own defense. These requirements ensure accuracy and fairness in the criminal proceeding.[4] They also further society's interest that the trial be dignified and that the accused know why he has been punished.[5]

The military has incorporated the Supreme Court's requirements into its Rules for Courts-Martial. The rules, however, use the term "mental capacity" to refer to what civilian courts call competency.[6] R.C.M. 909 sets forth the elements to establish lack of mental capacity: present mental disease or defect; which prevents the accused from understanding the nature of the proceedings; or which prevents the accused from conducting or cooperating intelligently in his defense.[7]

This article examines the procedures currently used to ascertain mental capacity, in order to prepare defense counsel to take appropriate actions. The article discusses the mechanics of the defense request for evaluation of mental capacity. It then looks at how mental health professionals can assess capacity. If defense counsel familiarize themselves with this process, they will be better able to interpret the results of competency testing. Next, the article suggests a methodology for counsel to use to analyze the results of a mental competency evaluation. Finally, the article discusses how defense counsel present the issue of lack of mental capacity to the appropriate authority and how to support the claim that the accused is not competent to stand trial.

Procedural Requirements

If defense counsel believes that the accused lacks mental capacity, counsel must notify either the convening authority or military judge of the belief and its basis.[8] If charges have not been referred, counsel notifies the convening authority. If charges have been referred, counsel normally notifies the military judge.[9]

Counsel makes the request for a mental examination under Rule 706 in either an Article 39(a) session or pretrial conference under R.C.M 802. Prior to making the request for mental examination, it will usually be helpful to discuss the "hypothetical" client with the psychologist or psychiatrist at Community Mental Health Services.[10] These staff members may be able to suggest which actions or statements of the client merit further attention and whether their professional training and experience indicate that there may be a question of incompetency. If defense counsel decides to request an evaluation, a written request makes the request a matter of record and states the reasons why counsel thinks that the accused may lack mental capacity. Counsel should avoid conclusive language concerning the factors relevant to competency. Instead, the request should identify what behavior and/or statements of the client have raised questions about the ability to stand trial.

Theoretically, defense counsel have free rein to request certain types of testing to be performed during the evaluation of mental capacity. In addition, counsel can request that the evaluation answer more specific questions than the competency questions contained in R.C.M. 706(c)(2)(D).[11] Military judges may resist such creativity, however, unless counsel can articulate why a certain question or test is

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[1] 362 U.S. 402 (1960).

[2] *Id.* at 402.

[3] 420 U.S. 162, 171 (1972).

[4] Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 458 (1967).

[5] *Id.*

[6] The issues of mental capacity and mental responsibility should not be confused. To determine mental capacity, courts evaluate the accused's mental status at the time of the court-martial. To determine mental responsibility, the court looks at mental status at the time of the offense. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(k)(1) [hereinafter R.C.M.].

[7] R.C.M 909(a).

[8] R.C.M. 706(a).

[9] R.C.M. 706(b)(2). The same rule, however, allows the convening authority to order a mental examination if no Article 39(a) session has taken place and the military judge is not yet reasonably available. Uniform Code of Military Justice art. 39(a), 10 U.S.C. § 839(a) (1982).

[10] Unless the defense counsel has no concern if the representations or descriptions of the client came to the attention of the trial counsel, it would be wise, in most cases, to avoid using the client's name during this discussion with Community Mental Health Services. Caution is warranted because the privilege concerning statements made during a mental evaluation only exists once the court orders such an evaluation under R.C.M. 706. *See* Mil. R. Evid. 302; United States v. Toledo, 25 M.J. 270 (C.M.A. 1987).

[11] Besides the question, "Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?," R.C.M. 706(c)(2) allows "other appropriate questions."

needed. Furthermore, counsel should avoid asking for particular tests or methods of assessment unless they have justification. Military judges will ordinarily assume that the evaluating organization will know what tests are needed, based on the nature of the request.

As an addendum to the request, defense counsel can attach a proposed order in the case. The order should state its basis, the scope of the evaluation, and the date by which results should be provided to the defense. [12]

If the military judge orders evaluation, information about the accused's background and the circumstances of the case will assist examining personnel. If counsel has knowledge of previous psychiatric or other mental health treatment, those records should be secured and provided to the evaluators. Counsel should also provide data about the case, such as the charge sheet and allied papers, and any investigative reports. This information will give the examining personnel a fuller understanding of the accused's case because they would otherwise depend on the accused as the source of most of their information. The importance of this background information will become clearer as the following discussion shows how mental capacity is measured.

Assessment of Mental Capacity

To interpret the results of a mental evaluation and determine whether the issue of mental capacity should be pursued, defense counsel must gain a basic familiarity with some of the ways mental capacity can be evaluated. Evaluating organizations have different methods to assess capacity and it is important to understand some of the factors that underlie these tests.

Because the issue of competency to stand trial affects a significant number of civilian criminal cases, [13] mental health professionals in the fields of forensic psychiatry/psychology have developed several specific measures of mental capacity. One of the more widely used tests of mental capacity is the Competency to Stand Trial Assessment Instrument. Other tests or checklists include the Competency Screening Test and the checklists developed by other teams of psychologists/psychiatrists. Although these tests or checklists differ in their methods, they were designed to give guidance and structure to the mental capacity inquiry.

Robey and Bukatman Checklists

The need to develop tools to assist courts, attorneys, and evaluators in resolving the issue of mental capacity has been recognized for a long time. The first efforts to gain any wide acceptance were developed in 1965 by Doctor Robey, a psychiatrist, who developed a checklist containing the functions that he thought an accused should be able to perform to have mental capacity. The general functions are an ability to understand the court proceedings, an ability to advise the defense counsel about the case, and the likelihood that the accused will decompensate, or lessen in mental capacity, while waiting for trial. [14] In 1971, another team of psychiatrists, led by Doctor Bukatman, created a series of interview questions that they used in court-ordered competency evaluations. Like the criteria used by Doctor Robey, these questions concentrated on whether the accused understood his current court situation and could cooperate with and assist defense counsel. [15] These early attempts were not wholly satisfactory, however, and other assessment methods, like the Competency Screening Test

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[12] A suggested order is as follows:

UNITED STATES	]	ORDER FOR INQUIRY INTO MENTAL CAPACITY
v.	]	
	]	
RANK/CLIENT'S NAME	]	
SOCIAL SECURITY NUMBER	]	DATE
United States Army	]	

After consideration of the defense Request for Inquiry into Mental Capacity, dated _____, I hereby order a mental examination of NAME OF SOLDIER. The mental examination should determine answers to the questions listed in Rule 706(c)(2) of the Rules for Courts-Martial [and the questions listed in paragraphs ___ and ___ of the Request for Inquiry into Mental Capacity]. This court orders that the written results of this mental examination be provided to the defense by _____.

MILITARY JUDGE'S
SIGNATURE BLOCK

[13] Civilian criminal cases involve the issue of mental capacity more often than the issue of mental responsibility or insanity. Shah, *Foreword* to Laboratory of Community Psychiatry, Harvard Medical School, Competency to Stand Trial at v (1974) [hereinafter Competency to Stand Trial].

[14] Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 Am. J. Psychiatry 616, 616–23 (1965).

[15] Bukatman, Foy & DeGrazia, *What is Competency to Stand Trial?*, 127 Am. J. Psychiatry 1225, 1225–29 (1971).

and Competency to Stand Trial Assessment Instrument, were developed.

Competency to Stand Trial Assessment Instrument

The Competency to Stand Trial Assessment Instrument (CAI) was developed in 1974 by a team of lawyers, psychiatrists, and psychologists who were associated with the Harvard Medical School.[16] The team chose its criteria as a result of observation, interview, and evaluation of a number of criminal defendants. The criminal defendants were patients in a state mental hospital where they had been referred for a pretrial competency evaluation. The team developed quantifiable criteria that reflected possible legal grounds for lack of capacity.[17] It also designed the test and its scoring system so that its terminology was familiar to both the mental health field and the legal profession.[18] Although known among some Army psychiatrists and psychologists, its use varies.[19] Counsel can discuss its use prior to evaluation with the evaluating organization.

The CAI contains thirteen items that are related to an accused's ability to function within the criminal justice system. The items are:

1. Appraisal of available legal defenses.
2. Unmanageable behavior.
3. Quality of relating to attorney.
4. Planning of legal strategy, including guilty plea to lesser charges.
5. Evaluation of role of:
   a. Defense counsel.
   b. Prosecutor.
   c. Judge.
   d. Panel (Jury).
   e. Accused.
   f. Witnesses.
6. Understanding of court procedure.
7. Appreciation of charges.
8. Appreciation of range and nature of possible penalties.
9. Evaluation of likely outcome.
10. Capacity to disclose to attorney available facts surrounding the offense including the accused's movements, timing, mental state, and actions at time of offense.
11. Capacity to realistically challenge prosecution witnesses.
12. Capacity to testify relevantly.
13. Self-defeating v. self-serving motivation.[20]

The team chose these factors because they had been used as the bases of findings of incompetency in actual court cases or in other clinical cases.

As a possible basis of a finding of lack of capacity, each factor differs substantively, as well as in importance, from the other factors. For example, an accused should normally have some appreciation of the charges in his case (7th item in CAI). His ability to testify relevantly (12th item) will not always be crucial, however. If there is other evidence that is a satisfactory substitute for the accused's testimony, the accused's inability to testify will not be that important.[21]

A trained evaluator can usually give the CAI in about an hour. The format of the CAI is an interview between the evaluator and the accused. The evaluator asks the accused a series of questions about the thirteen items. The handbook that describes the CAI gives samples of the questions and gives examples of how various responses should be scored. If the evaluating organization does not have copies of the test manual and instrument, counsel can probably obtain a copy through a larger university library or a civilian forensic evaluator.[22]

The scoring system for the CAI has a range from 1 to 5. The descriptions of what a particular numerical score means is as follows:

Score	
1	Total incapacity.
2	Severely impaired functioning (a substantial question of capacity).
3	Moderately impaired functioning (a question of capacity).
4	Mildly impaired (little question of lack of capacity).
5	No incapacity.[23]

The test manual indicates that scores less than or equal to 3 on a significant number of items should prompt further mental evaluation of the accused. To avoid malingering, knowledgeable evaluators try to verify low scores (1 or 2) with evidence of mental disease or defect.[24]

The handbook to the CAI as well as scientific literature contains information on the validity and reliability of the CAI. The CAI has been shown to be a valid way to assess mental capacity by comparison of predicted results based on its scores and ultimate court findings on the issue of competency.[25] Its statistics on reliability are also favorable.

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[16] Competency to Stand Trial, *supra* note 13, at 3. *Competency to Stand Trial* contains a copy of the test instrument and sample questions that the evaluator will use during the test.

[17] *Id.*

[18] *Id.*

[19] Telephone interview with Dr. Richard Harig, Chief, Psychological Services, Community Mental Health Services, Fort Sill, Oklahoma (Nov. 13, 1987).

[20] Competency to Stand Trial, *supra* note 13, at 98.

[21] *Id.* at 99–100.

[22] *Id.* at 109–14.

[23] *Id.* at 100–14.

[24] *Id.* at 100.

[25] T. Gutheil & P. Applebaum, Clinical Handbook of Psychiatry and the Law 259 (1982). *But see* R. Roesch & S. Golding, Competency to Stand Trial 64 (1980) (overall reliability and predictive validity of Competency to Stand Trial Assessment Instrument has not been adequately demonstrated).

The overall reliability measurement of the CAI, the consistency of CAI scores for an accused given repeated evaluations, is high.[26] The interrater reliability, or consistency of scores *when different evaluators* give the test, is also high. The extent of the reliability depends on whether the evaluator has had training on the use of the CAI.[27]

Competency Screening Test

Besides the Competency to Stand Trial Assessment Instrument, members of the team from the Harvard Medical School also helped to develop the Competency Screening Test (CST). The CST, like the CAI, is designed to act as a screening device during competency evaluations. Less well known and used as compared to the CAI, it is supposed to screen out "clearly" competent accused and thus save time and expense.[28] Because of its format, the CST can be done in approximately twenty-five minutes. The CST is organized around a sentence completion format. It contains twenty-two items that are partial sentences involving the criminal justice system.[29] The items deal with such aspects as the attorney-client relationship and the ability to understand the judicial process. The evaluator reads such incomplete sentences as "When Bob disagreed with his lawyers on his defense, he . . ." and the accused supplies the rest of the sentence.[30]

Each item has three possible scores. A score of 2 means the sentence completion was competent; a score of 1 is questionable; and a score of 0 is incompetent. The scores of the items are then added together.[31] The usual cutoff cumulative score on the CST is 20.[32] The cumulative score below 20 will prompt further evaluation.

Although the CST has a good measure of interrater reliability,[33] other measures of its validity and reliability are not as favorable as those of the CAI. Its designers, as well as other users, do not believe that its predictive validity is sufficiently accurate to use the test results alone as a basis for a finding of incompetency.[34]

Use of Other Psychological Tests

Current military law requires that a lack of capacity to stand trial be due to a present mental disease or defect.[35] Unless defense counsel can establish by a preponderance of the evidence that the accused has such a disease or defect, counsel has not met the threshold of R.C.M. 909(c)(2). A diagnosis of a mental disease or defect will usually be a result of other forms of psychiatric evaluation and psychological testing.

The results of certain psychological tests are related to findings of lack of mental competency. For example, the diagnosis of a psychotic disorder is highly correlated with a later evaluation of incompetency.[36] The presence of hallucinations or other delusions and impairment of orientation are also significantly related to lack of capacity.[37] Scores of an incompetent on certain scales of the Minnesota Multiphasic Personality Inventory (MMPI) are also likely to reflect the existence of such mental problems as psychoses and impairment in orientation.[38] Lower than average results on an intelligence testing and a previous psychiatric history are also often present.[39] Consequently, defense counsel should expect to find such mental conditions in the case where lack of competency is present.

Analysis of Assessment Results

Once the evaluation is complete and written results have been prepared, the process of analyzing the report of the mental evaluation must begin. Besides answers to the questions posed in the request under R.C.M. 706, the report will usually discuss in detail present and past psychiatric history, results of interviews and psychological testing, and summary and conclusions.

After reading the report, it is essential to discuss it with the examining psychiatrist or psychologist. Counsel must overcome the tendency to just accept the answers to the R.C.M. 706 questions and end their investigation. Further discussion with the psychiatrist and psychologist about the results of the examination can yield information that may be relevant to other aspects of the case. Such information includes extenuating and mitigating evidence, ways to improve the attorney-client relationship, or may even lead to a request for further evaluation.

In the event that the report indicates the accused may lack mental capacity, the defense counsel must discuss the case with the psychiatrist and/or psychologist. Interviews of the examining personnel are important because they are likely to be called as witnesses in any court proceedings on the issue of capacity. Counsel need a detailed understanding of the accused's disease or defect, the basis for the diagnosis, and what effect that has on the accused's ability to

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[26] Competency to Stand Trial, *supra* note 13, at 115. The reported reliability measurement is .87. Perfectly consistent scores would be reflected in a score of 1.0. G. Sax, Principles of Educational and Psychological Measurement and Evaluation 258–59 (2d ed. 1980).

[27] Competency to Stand Trial, *supra* note 13, at 39–41. Interrater reliability varies from .84 for evaluators without extensive training with the instrument to .89 for evaluators with more training with the CAI.

[28] *Id.* at 91–94.

[29] *Id.* at 90.

[30] *Id.*

[31] *Id.*

[32] R. Roesch & S. Golding, *supra* note 25, at 59.

[33] The interrater reliability is .93. Competency to Stand Trial, *supra* note 13, at 90.

[34] *Id.* at 94; R. Roesch & S. Golding, *supra* note 25, at 64.

[35] *See* R.C.M. 909(c)(2).

[36] Daniel, Beck, Herath, Schmitz, & Menninger, *Factors Correlated With Psychiatric Recommendations of Incompetency and Insanity*, 12 J. Psychiatry & L. 527, 533 (1984).

[37] *Id.*

[38] *Id.* at 529.

[39] *Id.*

perform the functions that he or she needs to perform before and during trial. Counsel should also try to determine what the prognosis for improvement is and what, if any, recommendations for treatment exist. If the accused has received psychological testing, counsel should discuss the results of these tests with the psychologist, determine their reliability, and analyze whether the results are consistent with the diagnosis of the psychiatrist. It will also be helpful to review the consultation sheets prepared by the examining personnel. These consultation sheets will be in the accused's mental health records.

Motion for Appropriate Relief

If the result of the mental examination is that the accused lacks mental capacity, counsel should notify the convening authority or military judge. If charges have been referred, counsel should present the issue in the form of a motion for appropriate relief under R.C.M. 906(b)(14) and 909. R.C.M. 906(b)(14) states that mental capacity is a possible ground for a motion for appropriate relief. R.C.M. 909 gives the standards that will govern the resolution of the issue of mental capacity.

The motion for appropriate relief should state the reasons why the accused lacks the capacity to stand trial. It should indicate what mental disease or defense the accused has. It should also outline why the disease or defect prevents the accused from understanding the nature of the proceedings or from cooperating intelligently in the defense. The motion should also state how and by whom these conclusions were reached.

In presenting the motion, it may be helpful to refer to the factors that the American Law Institute (ALI) believes a court should consider before it makes a competency decision. These factors guide the judge as to what minimum capabilities are necessary for the accused to have. The ALI thinks an accused should have the mental ability to:

a. Appreciate his presence in relation to time, place, and things.

b. Understand that he is charged with a crime in a court.

c. Understand that a judge is in charge of the court and the accused's trial.

d. Understand that the prosecutor will try to convict him.

e. Understand that he has a lawyer to defend him against charge.

f. Understand that he has a right to testify or not testify and that if he does testify, he should tell the facts about the alleged offense.

g. Understand that he can plead guilty and its consequences and that he has mental abilities to waive the constitutional rights that are waived in a guilty plea.

h. Participate in adequate presentation of a defense.[40]

Because the accused is presumed to have mental capacity,[41] defense counsel will bear the burden of proving that the accused lacks capacity. R.C.M. 909(c)(2) indicates that counsel must satisfy this burden by the preponderance of the evidence. To satisfy this burden, counsel will usually introduce relevant portions of the mental evaluation report and call one or more of the experts who examined the accused. Counsel may also call lay witnesses with sufficient contact with the accused who can testify about incidents of bizarre or otherwise relevant behavior.[42]

If defense counsel establishes that the accused lacks mental capacity, the remedy is normally the continuance of the proceedings[43] until the accused regains mental capacity. The estimated length of the continuance will usually determine the resolution of the case. If the charges are not particularly "serious" and the examining personnel cannot give definite guidance as to the duration of the lack of mental capacity, the convening authority is likely to withdraw the charges. In that case, steps will ordinarily be taken to eliminate the accused from the service by administrative means for medical reasons.[44] If the examining personnel indicate that treatment or time will improve capacity, charges are likely to remain in effect while the government tries treatment and conducts additional mental examinations.

Conclusion

Counsel should not bypass the issue of mental capacity. Although the issue does not arise often, defense counsel must be prepared to litigate it effectively. Effective presentation requires that counsel comply with the procedural aspects of R.C.M. 706 and 909. Counsel should also have a basic familiarity with the various factors that may be considered to evaluate competency, as well as possible tests that may be used. Once the results of the evaluation have been presented to the defense, counsel should analyze those results and, if necessary, conduct further investigation. After the results have been examined, counsel must decide whether to pursue the issue of competency in court. If counsel does decide to pursue the issue, the above guidelines for the motion for appropriate relief should prove helpful and give insight into how the case may proceed.

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[40] Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 Geo. Wash. L. Rev. 375, 377 & n.11 (1985).

[41] R.C.M. 909(b).

[42] *Cf.* United States v. Martinez, 12 M.J. 801, 807 (N.M.C.M.R. 1981) (government called accused's guard and his roommate on issue of mental capacity).

[43] *See* R.C.M. 909(c)(2) discussion.

[44] *See* Dep't of Army, Reg. No. 40-501, Medical Services—Standards of Medical Fitness, paras. 3-31 to 3-36 (1 July 1987).

The Court of Military Appeals in Fiscal Year 1987

According to figures compiled by the Army Judiciary Clerk of Court, the United States Court of Military Appeals in fiscal year 1987 decided 135 cases by full opinion. One-hundred of the decisions (74%) were unanimous (in approximately one-third of those, only two judges, Chief Judge Everett and Judge Cox, participated). Seventeen decisions produced dissents and in 18 cases one or more judges concurred only in the result.

The following table shows the number and type of opinions written by each judge. Concurring opinions include those concurring in the result, but do not include concurring statements citing only the author's opinion in an earlier case.

Judge	Opinions	Concurrences	Dissents
Everett	33	17	6
Cox	51	16	6
Sullivan	36	6	6

In addition to the signed opinions, 15 opinions were issued per curiam. Judge Sullivan did not participate in 33 of the earliest decisions, perhaps because the case had been heard before he joined the Court in May 1986 or because of previous involvement by him as Air Force general counsel.

The table below shows each judge's dissents according to author of the principal opinion.

	Dissent in Opinions By			
Judge	Everett	Cox	Sullivan	Per Curiam
Everett	xxx	4	1	1
Cox	5	xxx	1	0
Sullivan	1	5	xxx	0

Decisions of the courts of military review were reviewed in 133 of the court's decisions (others were a decision on a petition for extraordinary relief filed directly with the Court of Military Appeals and a decision on a motion to file petition supplement out of time). The table below compares the reversal rates of the several courts of military review (CMR), including reversals in part and decisions set aside.

CMR	Cases Reviewed	Reversal Rate
Army	52	26.9%
Navy	49	32.7%
Air Force	32	53.1%
Coast Guard	0	0
Total	133	35.3%

Because petitions have been denied in some 89% of cases petitioned for review, the reversal rates shown above and below can be multiplied by .11 to obtain the approximate reversal rate when all petitioned cases are considered.

In addition to the 133 appeals indicated above as having been decided by full opinion, the Court of Military Appeals disposed of 205 cases by summary disposition (204) or memorandum opinion (1). These dispositions produced one concurrence by Chief Judge Everett; concurrences in the result by the Chief Judge (2), Judge Cox (2), and Judge Sullivan (1); and dissents by Judge Cox (2), and Judge Sullivan (2).

At least 83 of the 205 summary dispositions appeared to involve so-called trailer cases; that is, cases in which review had been granted on an issue already pending before the court and decision withheld until disposition of one or more selected cases by full opinion. Courts of military review decisions were affirmed in 63 of those 83 cases.

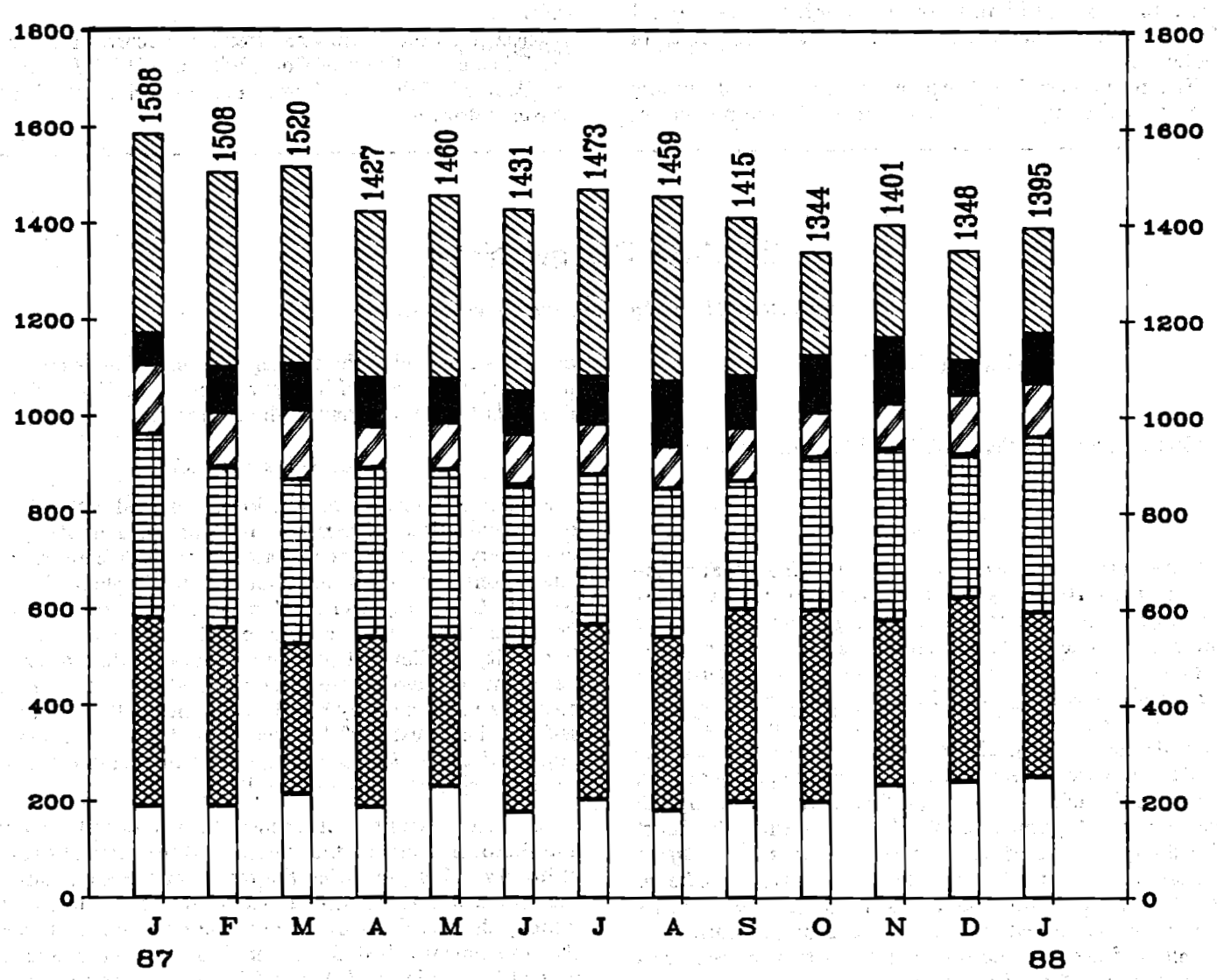
Of the remaining 122 appeals, 21 cases were remanded to courts of military review for consideration of issues that had not been raised in the court below or for further review in the light of subsequent decisions of the Court of Military Appeals or the Supreme Court. Disposition of the remaining 101 cases decided on the merits is shown in the following table:

CMR	Affirmed	Reversed (Multiplicity)	Reversed (Other)	Reversal Rate (All)
Army	24	11	17	53.8%
Navy	9	7	7	60.9%
Air Force	14	5	7	46.2%
Coast Guard	0	0	0	0
Total	47	23	31	53.5%

Cases counted as having been reversed on grounds of multiplicity are those in which the Court of Military Appeals amended, consolidated, or dismissed specifications for multiplicity, but otherwise affirmed the court of military review decision.

The information above is based on decisions published from volume 22, *West's Military Justice Reporter*, page 438, to volume 25, page 148, and in Daily Journals 87–1 through 87–248. The figures are not official and judgments as to what constitutes a concurrence, reversal, or trailer case are solely the responsibility of the Clerk of Court, U.S. Army Judiciary. Tabular presentations have been based on those used by the *Harvard Law Review* and the *National Law Journal* in reporting on the Supreme Court.

Army Courts-Martial Awaiting Trial or Appellate Review (GCM and BCDSPCM)



Expecting that our readers may be interested in the information used to apprise The Judge Advocate General and his staff of the state of the military justice system, we offer the graph above as an example of several produced monthly in the Office of the Clerk of Court.

This graph shows the reported total number of GCM and BCDSPCM cases pending as of the *first* day of the months shown from 1 January 1987 to 1 January 1988. Thus, the graph covers the full calendar year 1987, plus one month to permit comparison of the current month with the same month one year ago.

The white area at the base of each column represents the number of docketed cases awaiting trial, of which there were 253 reported by the Trial Judiciary as of 1 January 1988. Of course, the number always includes some that will not be tried when the convening authority approves instead a requested administrative discharge for the good of the service. Nor will all of the BCDSPCM climb the ladder shown, for some do not result in approved BCD sentences.

The crosshatch area above the white shows the number of GCM and BCDSPCM cases awaiting action by the convening authority (that is, cases in which the Clerk of Court has received a case report from the trial judge, but has not received the record of trial from the convening authority). As of 1 January 1988, there were 343 such cases.

The segment occupied by horizontal lines represents the number of cases received and awaiting the filing by counsel of an Assignment of Error and Brief on Behalf of Appellant; 364 as of 1 January 1988.

Next above, an area marked by a series of three diagonal lines shows the number of cases awaiting filing of government counsel's answer to the Assignment of Errors. There were 112 pending on 1 January 1988.

Solid black designates cases at issue awaiting decision by the Army Court of Military Review—103 on 1 January 1988. A few may be awaiting oral argument and some held in abeyance pending further briefs or other action such as corrections in the record.

Finally, diagonal lines at the top of the column depict cases pending before the U.S. Court of Military Appeals

(215 as of January 1988), either on petition for grant of review or for decision on the merits in a granted or certified case, and cases pending before the Supreme Court (on 1 January 1988, 5 cases were awaiting grant or denial of certiorari).

The most observable change in the period from 1 January 1987 to 1 January 1988 was a decrease in the number of cases pending at the Court of Military Appeals from 408 to 215. That exactly matches the overall decrease of 193 total cases.

These and other graphs required are prepared in color in the Office of the Clerk of Court with an IBM XT, a Hewlett-Packard ColorPro plotter, and Ashton-Tate's Chart-Master software.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Note

United States v. Toledo—A Quasi Psychiatrist-Patient Privilege

Introduction

Some thirty years ago, in *Griffin v. Illinois,*[1] Supreme Court Justice Hugo Black noted that "there can be no justice where the kind of trial a man gets depends on the amount of money he has."[2] And, in subsequent years, the Supreme Court has moved to ensure that indigents have meaningful access to justice. In the military, financial status is not a consideration.[3] Nevertheless, the Court of Military Appeals has been equally committed to ensuring that the military accused has equal access to evidence and witnesses, including the ability to hire expert witnesses "necessary" to the defense.[4] A prime example of this concern is the Court of Military Appeals' decision in *United States v. Mustafa,*[5] which extends to the military the rule of *Ake v. Oklahoma.*[6] *Ake* entitles an accused to a qualified psychiatrist or psychologist for the purpose of presenting an insanity defense if the defense establishes that the accused's sanity will be a "significant factor" at trial.

Defense counsel, therefore, have faced a preliminary burden of establishing that the accused's sanity will be a significant factor before their entitlement to expert assistance accrues. Moreover, because the mere assertion by the accused or counsel that the accused is insane has been generally recognized to be insufficient to establish the required threshold,[7] defense counsel have turned to local government psychiatrists for initial assistance despite significant questions concerning the privileged nature of these communications. The Court of Military Appeals, in *United States v. Toledo,*[8] answers many of these questions.

United States v. Toledo

Seaman Recruit Hector Toledo was charged with numerous specifications of sexually abusing the daughter of a naval petty officer. In the preparation of his defense, his defense counsel sought the assistance of Dr. (Captain) Paul E. Rosete, U.S.A.F., a clinical psychologist, to establish "whether or not there were any possible problems concerning sanity."[9] Counsel privately requested the doctor to keep "the conclusions, reports, notes, and tests . . . in strict confidence and that they be released to none other than myself and the accused."[10] Defense counsel did not, however, request that Dr. Rosete be appointed to examine the accused or to assist in the defense.[11]

Dr. Rosete examined the accused for ten to twelve hours, and thoroughly probed the offenses and the accused's sexual history. After evaluating the results of the examination, the defense decided to neither call Dr. Rosete nor to use the insanity defense.[12] At trial, the defense was shocked when the government called Dr. Rosete in its case-in-rebuttal to present his opinion of Toledo's "character for truth and veracity" and to provide rebuttal for testimony regarding Toledo's sex partner on the night in question. The defense counsel objected, arguing that the government should be precluded from calling the doctor as a witness based on defense counsel's request for confidentiality, and, citing Military Rule of Evidence 706, that this preliminary consultation was a necessary predicate for determining the propriety of a sanity board.[13] The military judge ruled that the testimony was admissible for the stated purposes.

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[1] 351 U.S. 12 (1956).

[2] *Id.* at 19.

[3] *See* United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986), *cert. denied,* 107 S. Ct. 444 (1986).

[4] United States v. Garries, 22 M.J. 288 (C.M.A. 1986).

[5] 22 M.J. 165 (C.M.A. 1986), *cert. denied,* 107 S. Ct. 444 (1986).

[6] 470 U.S. 68 (1985).

[7] Volson v. Blackburn, 794 F.2d 173 (5th Cir. 1986).

[8] 25 M.J. 270 (C.M.A. 1987).

[9] *Id.* at 274.

[10] *Id.*

[11] *Id.* at 276.

[12] *Id.* at 274.

[13] *Id.*

On appeal, Toledo renewed his argument that the military judge erred by permitting Dr. Rosete to testify. The Court of Military Appeals examined Toledo's objections and determined that no doctor-patient privilege was available under Mil. R. Evid. 501. Likewise, Mil. R. Evid. 706, 302, and Rule for Courts-Martial 706[14] did not help Toledo because Dr. Rosete's examination was not ordered under R.C.M. 706 or any other provision.

Significantly, however, the court examined another aspect of the issue that was not raised at trial or on appeal.[15] Under Mil. R. Evid. 502, the court noted that in certain circumstances, the attorney-client privilege could have allowed Toledo to use the services of Dr. Rosete without risking disclosure of his statements.[16] For example, upon a proper request, Dr. Rosete could have been designated as a representative of the defense counsel and thereby any confidential communications made to Dr. Rosete would have been privileged under the attorney-client privilege (Mil. R. Evid. 502(a)). Here there was no request and the court found no attorney-client privilege with respect to the statements to Dr. Rosete. Additionally, the court noted that had Toledo hired his own expert, the evaluation would have been protected by this same privilege.[17]

Perhaps the real issue in *Toledo* is why the court decided to address the attorney-client aspect of the issue. As previously noted, it was neither raised at trial[18] nor on appeal. Apparently, the Court was looking for a vehicle to announce its views on the attorney-client privilege and give some definition to a defense counsel's work-product. In providing these guidelines, the Court stated that Toledo could have requested and received assistance from a government-provided medical officer under *Ake v. Oklahoma.*[19] If the government had failed to provide the assistance, the court would have held that Toledo had been deprived of "meaningful access to justice."[20] *Toledo* also indicates that the court is not going to treat an examination ordered under R.C.M. 706 as satisfying the requirements of *Ake.*[21] Absent in the opinion, however, is any clear indication as to how the right to psychiatric assistance accrues.

The key requirement from *Ake* is that the defense must establish that the sanity of the accused at the time of the offense will be a "significant factor" at trial.[22] The government's obligation to provide an expert is not triggered until such a threshold showing is made. While the burden of the accused to establish this requirement has not been previously addressed by the Court of Military Appeals, circuit court treatment of this requirement has placed a heavy burden on the defendant. In *Cartwright v. Maynard,*[23] the Tenth Circuit held that the defense must make a clear showing that sanity is in issue and a close question that might be decided one way or the other at trial. In comparison, the court in *Toledo* suggests that the "mere circumstances" in which Toledo was discovered by the father of the victim established that sanity was to be a significant factor at trial.[24]

The *Toledo* court, assuming this threshold requirement was met, found authority in federal case law to allow the defense to assert the attorney-client privilege to bar disclosure of confidential communications between the accused and a psychiatrist or even a psychotherapist. The privilege will be waived, however, if the accused asserts the insanity defense. For example, in *United States v. Alvarez,*[25] a psychiatrist was retained to conduct a psychiatric examination of a codefendant. The resulting report was provided to the defense counsel. The government subpoenaed the psychiatrist and the trial judge permitted him to testify over defense objection. The Third Circuit stated:

> The effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting. If the expert is later used as a witness on behalf of the defendant, obviously the cloak of privilege ends. But when, as here, the defendant does not call the expert the same privilege applies with respect to communications from the defendant as applies to such communications to the attorney himself.[26]

Thus, Toledo's error was in failing to ask the government to appoint a psychiatrist to be part of the defense team. While the accused may have the right to a psychiatrist as a matter of due process of law, the right does not extend to choosing any psychiatrist and if an accused "commandeers" a government expert, the court will not be sympathetic to a claim of privilege.[27]

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[14] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 706 [hereinafter R.C.M.].

[15] 25 M.J. at 276.

[16] *Id* at 275.

[17] *Id.* at 276.

[18] The issue was therefore waived on appeal. Mil. R. Evid. 103(a).

[19] 470 U.S. 68 (1985).

[20] *Id* at 76, *as cited in Toledo,* 25 M.J. at 276. "Meaningful access to justice," however, relates to the *Ake* Court's treatment of issues relating to indigent defendants and the court's reliance on the *Ake* decision in that context is misplaced.

[21] In *Mustafa,* the court hinted that a board of medical officers may satisfy the accused's right to a psychiatric evaluation. 22 M.J. at 169; *see also* United States v. Davis, 22 M.J. 829 (N.M.C.M.R. 1986).

[22] 470 U.S. at 83.

[23] 802 F.2d 1203 (10th Cir. 1986).

[24] The victim's father testified that, upon being discovered, the accused turned away and walked towards the corner of the room. He had his hands in front of him. The father did not see the accused's penis, but saw a pubic hair. The accused quickly turned away and started to zip his pants. The father said, "What the hell is going on here?" The accused tried to fix his pants and put on his belt. The accused never said a word. He left without looking at the victim's father. The accused was sweating profusely during the encounter with the victim's father. 25 M.J. at 272. (Contrasting the two standards, the federal standard appears to be much more stringent.)

[25] 519 F.2d 1036 (3d Cir. 1975).

[26] *Id.* at 1046.

[27] 25 M.J. at 276.

Conclusion

So how should the defense counsel prepare the case? As in *Toledo*, the defense may not want to tip off the government by requesting that an expert be appointed to assist in determining whether the insanity defense may exist. To obtain appointed assistance, the defense must make a preliminary showing that the accused's sanity at the time of the offense will be a significant factor at trial. The request for assistance will alert the government and a sanity board will be ordered.[28]

The only way the defense can obtain privileged expert assistance without tipping off the government is for the defense to procure the assistance at its own expense. This consultation will be privileged, at least until the insanity defense is asserted. Unfortunately, most military accused cannot afford the luxury of paid experts. The Court of Military Appeals has, however, also made it clear that an attorney-client privilege will be recognized even if a government expert has been appointed to assist the defense. The strategic price of such assistance appears to be minimal if the sanity of the accused at the time of the offense is likely to be a significant factor at trial. Moreover, the Court of Military Appeals' standard for ordering assistance seems to be very low.[29]

Toledo gives the defense the closest thing to a psychiatrist-client privilege that military and federal courts are currently willing to recognize. Defense counsel should make extensive use of this tool to ensure that all aspects of a case are explored. Tipping off the government is a small price to pay. Major Williams and Major Wittman.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

Consumer Law Notes

So What Is a Picture Worth?

Consumers should beware of deceptive practices used to sell photographic portraits. Park Way Studios, International, Inc., a Pennsylvania company doing business in Alaska, and Trinity Studios, a North Carolina firm doing business in Vermont, have both entered consent agreements to cease allegedly deceptive business practices. The Alaska attorney general asserts that Park Way Studios told consumers that they had qualified for "consolation prizes," "bonus vouchers," or "gift certificates" entitling them to a "beautiful 8 × 10 color portrait" regularly valued at $34.95 for only $6.99 for shipping and handling charges. The complaint contends that Park Way had, in fact, never sold this product for more than $6.99 and had solicited consumers' payments for the advertised portrait without disclosing that in order to obtain the portrait they would be required to attend a sales presentation at which representatives would attempt to persuade them to purchase photo packages costing hundreds of dollars. Under the terms of the Alaska consent agreement, Park Way is required to allow consumers a five-day "cooling off" period before making any purchase beyond the basic $6.99 portrait.

The Vermont attorney general alleges that Trinity Studios lured consumers to its sales presentations by misrepresenting that they had won a contest and were entitled to a "free" family portrait. When consumers arrived to have the "free" portrait done, sales representatives attempted to sell them contracts for photographs costing as much as $4300. The Vermont consent agreement requires that Trinity provide consumer refunds and discontinue the bogus contests.

Reliance on "Independent" Consumer Testing Services May Be Misplaced

The Iowa attorney general contends that a half-hour television program called "Consumer Challenge," which is represented as a "show that challenges the products of our time to make [the listener] a better informed consumer," is actually a paid advertisement. The program, which purports to investigate "Blublocker" sunglasses, is paid for by JS & A Group, the Illinois company that sells the sunglasses. In addition to the television program, JS & A also funds newspaper and magazine advertisements which imply that "Consumer Challenge" is an independent consumer testing service. The attorney general seeks an injunction, restitution, and civil penalties.

Crafty Craftmatic

Craftmatic/Contour Organization, Inc., has paid $25,000 in penalties and costs pursuant to an agreement with the Pennsylvania attorney general, whose Bureau of Consumer Protection alleged that Craftmatic engaged in misleading sales practices in violation of two prior "assurances of voluntary compliance."

Consumer complaints against the adjustable bed company included, among other things, that Craftmatic sales representatives misled consumers by offering so-called price "discounts" based on such things as the consumer's age, health, or financial status. The attorney general asserts that the "discounts" were routinely offered to all potential buyers incident to price negotiations.

Consumers also alleged that sales representatives offered them "free" prizes with the purchase of a bed but agreed to lower the price of the bed if the buyer chose to forfeit the

[28] The opinion in *Toledo* at note 5 speculates that the defense wanted to avoid a sanity board so that if the results of the board were not favorable to the defense, the defense theory on sentencing, that the accused was a sick man, would not be undercut. While that may have been the defense strategy, such a defense theory on sentencing may always be argued regardless of whether expert evidence is available. Defense counsel will also be placed in an awkward position in that a subsequent failure to raise the insanity defense may result in an allegation of ineffective assistance.

[29] The facts from *Toledo* are not particularly bizarre. "In practice, military trial defense counsel must introduce evidence to the military judge or the convening authority of an accused's prior treatment for mental illness, bizarre behavior, use of antipsychotic drugs, results of a preliminary sanity inquiry, or similar substantiation before requesting the assistance of a psychiatric expert." Dubia, *The Defense Right to Psychiatric Assistance in Light of* Ake v. Oklahoma, The Army Lawyer, Oct. 1987, at 15, 20.

prize. In addition, consumers complained that representatives falsely denied that they were working on commission and refused to refund payments to consumers who exercised their three-day right to rescind contracts executed pursuant to home solicitations. Major Hayn.

Tax Notes

Overnight Camp Expenses No Longer Qualify for Dependent Care Credit

Prior to 1988, taxpayers could claim the child and dependent care credit for expenses incurred to send a child or other dependent to an overnight camp (I.R.C. § 21(b) (West Supp. 1987)). Congress amended Code section 21 to preclude taxpayers from claiming these expenses for purposes of computing the child and dependent care credit effective for tax year 1988 (Revenue Act of 1987 § 10101, amending I.R.C. § 21(b)). This legislative change was based on the conclusion that the expense of sending a child to summer camps is not sufficiently related to a taxpayer's employment to qualify for the credit.

Congress did not make any other changes to the child and dependent care credit for 1988. Soldiers who incur employment-related child care expenses this year will be eligible for the credit if they furnish more than one half the cost of maintaining a household for a child or other qualifying dependent (I.R.C. § 21 (West Supp. 1987)). Qualifying expenses could include the cost of child care, nursery school, and housekeeper or baby-sitting salaries and fees.

The income tax credit available for taxpayers in 1988 is equal to up to thirty percent of employment-related dependent care expenses. The amount of expenses eligible for the credit is, however, limited to $2,400 if there is one qualifying dependent, and $4,800 if there are two or more. The credit is further limited if the taxpayer's adjusted gross income exceeds $10,000. The thirty percent credit rate is reduced by one percentage point for every $2,000 of income earned between $10,000 and $28,000. The credit rate for all taxpayers with adjusted gross incomes over $28,000 is twenty percent. Major Ingold.

Congress Changes Mortgage Interest Limitation Rules for 1988

Just when tax preparers began getting comfortable with the complex mortgage interest limitation rules contained in the 1986 Tax Reform Act and implementing Form 8598, Congress decided to change them. The changes to the rules, which take effect for tax year 1988, will benefit most military homeowners because they increase the amount of the total mortgage debt that qualifies for the interest deduction (Revenue Act Of 1987) [hereinafter 1987 Act] § 10102, amending I.R.C. § 163(h)(4)).

The 1986 Tax Reform Act retained the deduction for mortgage interest paid on indebtedness secured by a taxpayer's principal residence and a second residence to the extent that the total debt did not exceed the purchase price of the residence plus the cost of home improvements and qualified educational and medical expenses (Tax Reform Act of 1986, Pub. L. No. 99–514, 100 Stat. 2085 (1986) [hereinafter 1986 Act]). The 1986 changes to the mortgage interest deduction were discussed in two previous notes in this column (Note, *IRS Releases Proposed Drafts of New Tax Forms*, The Army Lawyer, Oct. 1987, at 59; and Note, *IRS Clarifies Who Must File Home Mortgage Interest Form*, The Army Lawyer, Dec. 1987, at 44).

The 1987 Revenue Act changes the mortgage interest limitation rules by increasing the ceiling on the mortgage debt qualifying for the deduction to $1 million. After 1987, taxpayers will be able to borrow up to $1 million to acquire or improve their first and second residences and deduct the total amount of interest paid on the loan.

In addition, the new law creates a simplified limit on home equity borrowing. The aggregate amount of home equity indebtedness may not exceed $100,000 ($50,000 for a married individual who files a separate return). Thus, the total amount of acquisition and home equity indebtedness on a principal and second residence may not exceed $1,100,000.

The extra $100,000 home equity loan allowed under the 1987 Act need not be incurred for educational or medical expenses, as was required under prior law. As a result, joint filers will be able to deduct interest payments on up to $100,000 of additional debt secured by their homes that is used for any purpose, such as to purchase automobiles, furniture, or vacations. Amounts used to pay for medical and educational costs are, however, included in the overall home equity ceiling of $100,000.

The 1987 Act includes a special phase-in rule for homeowners who financed or refinanced their homes prior to the effective date of the 1987 Act, 14 October 1987. Interest on these debts continues to be deductible and the debt is not subject to the $1 million limitation.

The new mortgage interest rules greatly simplify the perplexing rules contained in the 1986 Tax Reform Act. Taxpayers owning one or two homes with a combined mortgage of less than $1 million will not have to worry about a mortgage debt ceiling or file a complex federal income tax form in 1988. The new rules will also make homeowners using home equity loans to purchase consumer items happy because interest on these loans will be deductible in full up to the $100,000 "cap." Losers under the new rules include taxpayers who have purchased expensive homes or who plan to purchase expensive second residences or qualifying vacation homes. Major Ingold.

Family Law Note

Is the Ellis *Island Sinking?*

In a sea of states that are willing to treat military retired pay as marital property and to divide it upon divorce, the most reliable high ground for soldiers has long been Colorado. Even after enactment of the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408) in 1982, the state supreme court continued to hold to its earlier ruling that military retired pay was not truly a property interest, and therefore a court could not divide it between spouses. *Ellis v. Ellis*, 191 Colo. 317, 552 P.2d 506 (1976). Lower courts have consistently adhered to this concept. *See, e.g., In re Lachak*, 704 P.2d 874 (Colo. Ct. App. 1985). As a result of the recent case on *In re Grubb*, 745 P.2d 661 (Colo. 1987), however, Colorado courts may be ready to join the vast majority of jurisdictions and apply equitable distribution doctrines to military retired pay.

A review of the *Ellis* holding is necessary to understand *Grubb's* significance. For over a decade, Colorado has distinguished between pension plans that create an ascertainable, measurable asset and those where valuation is difficult. In *Ellis*, the court observed that military retired pay has no cash surrender value, no loan value, no redemption value, no lump sum value, and no remainder value after the retiree dies. The court also noted that a soldier could die without receiving any retired pay at all, although Mr. Ellis had actually retired and was receiving monthly military pension checks at the time the case was litigated.

In light of these valuation problems, military retirement benefits were viewed as a mere potential future stream of income rather than "property." The court also analogized retired pay to a business' good will, which is not divisible as marital property under Colorado law. This was a minority viewpoint on the division of retired pay even in 1976, and it is an extreme minority position today. Indeed, in the ensuing years, only Kansas courts adopted a similar rule regarding military pensions (*Grant v. Grant*, 685 P.2d 327 (Kan. 1978)), and in July 1987 the Kansas legislature nullified the *Grant* decision with a statute that expressly defines military retired pay as marital property. *See* Kan. Stat. Ann § 23–201(b).

Grubb provided the court with an opportunity to reexamine the logic used in *Ellis* and other cases involving certain civilian retirement plans (*see, e.g., In re Ward*, 657 P.2d 979 (Colo. Ct. App. 1982), which held that a civilian retirement plan was not divisible). Mr. Grubb had a vested pension benefit that had not yet matured. That is, he had fulfilled all the requirements to receive retired pay except that he had not yet reached retirement age. Were he to die before he retired, no payments would be made on his behalf. Thus, at the time of the trial, his pension was a mere expectancy; it had no definite current value. Nonetheless, the court held that Mr. Grubb's interest in his pension constituted marital property. Any language in *Ellis* requiring a contrary result was disapproved.

Does *Grubb* mean that *all* military retired pay is divisible? The opinion is ambiguous on this point. Some language suggests a broad application, such as the court's statement that

> [w]e are satisfied that our analysis in *Ellis* . . . does not adequately account for the true nature of retirement plans. Retirement benefits, far from being a mere gratuity . . . are nothing less than a form of deferred compensation—that is, they are consideration for past services performed . . . and constitute part of the compensation earned by the employee.

The court goes on to quote with approval the following language from a Maryland case.

> [I]t is significant that over the past several years, pension benefits have become an increasingly important part of an employee's compensation package which he or she brings to a marriage unit. Moreover, in a situation where economic circumstances prevent a husband and wife from saving or investing a portion of the wage earner's income, the pension right swells in importance as retirement or vesting approaches, and may well represent the most valuable asset accumulated by either of the marriage partners. (Citation omitted.)

As the court seems to favor Maryland precedent, it may be worthwhile to ask how that state treats military retired pay. It is divisible as property in Maryland, but not as a result of case law. Rather, state law defines military retired pay as marital property. Md. Ann. Code § 8–203(b).

On the other hand, there is reason to believe that *Grubb* has a somewhat limited application. For example, the court repeatedly speaks of the fact that Mr. Grubb's pension was vested, by which it means that the employee has a right to the money deriving from his or her employment contract. Furthermore, in this case

> [s]uch a right is not a mere expectancy but, rather, is an enforceable contractual right that traditionally has been recognized as a *chose in action* and thus a form of property. We find the controlling consideration to be that an employee who is fully vested under a pension plan has a *right* to receive payment at some time in the future (emphasis in original) (citations omitted).

Moreover, the actual holding of *Grubb* is couched in terms that may not apply to military retirement benefits. Specifically, the court held that "a spouse's interest in a vested but unmatured employer-sponsored pension plan, to the extent . . . funded by [the] employee and/or employer . . . during the marriage, is marital property subject to equitable distribution." Do military pensions ever "vest"? Does it make a difference that there never is a "contractual right" to military retired pay? Indeed, how will the court rule on the question whether military retired pay is deferred compensation versus reduced current pay for reduced current services (*see, e.g., McCarty v. McCarty*, 453 U.S. 210 (1981), which notes the issue but does not decide it)? These issues will ultimately define the divisibility of military retired pay in Colorado.

There are two clues as to the path Colorado may follow in future cases. The first lies in the quotation from Maryland. The last sentence of that passage is intriguing because it admits the possibility that even nonvested pensions may be divisible ("the pension right swells in importance as . . . vesting *approaches*") (emphasis added).

The second clue comes from an even more recent case in which the Colorado Supreme Court further elucidated its *Grubb* decision. *In re Nelson*, No. 85SC412 (Colo. Dec. 21, 1987) (to be reported at 746 P.2d 1346) involves a retirement plan with the following characteristics: fully employer-funded; no benefits paid until the employee reaches the age of 55 or becomes totally disabled; no benefits are due if the employee dies before reaching 55 or becoming totally disabled; the benefits cannot be anticipated, alienated, sold, transferred, assigned, pledged, or encumbered; and, if an employee begins receiving benefits but then dies leaving a surviving spouse, the spouse will continue to get 50% of the benefits that would have been paid to the employee.

In *Nelson*, the employee was not yet 55 and neither was he totally disabled. Nonetheless, the court concluded, without any discussion, that he had a "vested" interest sufficient to bring the matter within the *Grubb* decision. The potential future retirement benefits constituted marital property and were held to be subject to equitable distribution.

Legal assistance attorneys who advise spouses of soldiers living or domiciled in Colorado must be cautious in drafting and reviewing separation agreements. While the law

currently is somewhat unsettled, former spouses now may be entitled to share in military retired pay. Litigation may be necessary to get it, but the client must be advised that this asset potentially is divisible. Major Guilford.

Fraudulent Home Sales in San Antonio, Texas

Hundreds of active duty military homeowners in San Antonio, Texas, participated as plaintiffs in a lawsuit against Ray Ellison Homes, Inc. The complaint alleged a fraudulent scheme of selling homes to the plaintiffs at inflated prices based upon a misrepresentation that the homes were located in subdivisions that were primarily owner-occupied. The complaint further alleged that many of the unsold homes remaining in the various subdivisions were then sold in groups to investors for use as rental properties.

The litigation was settled before trial with a multimillion dollar cash payment divided among the plaintiffs. Unfortunately, this was inadequate relief. Military homeowners faced with PCS orders were unable to sell their homes for anything close to the amount owed on their VA guaranteed loans. Furthermore, they were unable to rent their homes for amounts close to their monthly mortgage payments. Many of these homeowners have already lost their homes through foreclosure or are presently defending foreclosure actions.

Captain Daryl B. Magid is presently representing a military couple who was victimized by this scheme. Research into their case has disclosed the potential for additional defendants and additional theories of recovery, as well as newly-discovered evidence that may provide the basis for further relief. Further details will appear in a future issue of *The Army Lawyer*. Many legal assistance attorneys are likely to counsel similarly situated victims of this scheme or closely related schemes. Legal assistance attorneys with such clients are invited to contact Captain Magid at the Legal Assistance Office, Office of the Staff Judge Advocate, Fort Gordon, Georgia 30905, telephone (404) 791–7812/7813/7883/6673. The AUTOVON prefix is 780; the FTS number is 240–7883/6673.

Claims Report

United States Army Claims Service

Are Military Physicians Assigned Overseas Immune From Malpractice Suits?

Frank N. Bich
Attorney Advisor, Special Claims Branch

Following surgery at a United States Army hospital in West Germany to repair a cleft lip, a three-month-old infant suffered respiratory arrest due to application of a dressing over her nostrils. She was promptly intubated and recovered satisfactorily. Several years later, she developed signs of retardation. Her father, a retired noncommissioned officer, filed a claim under the Military Claims Act,[1] alleging postoperative malpractice causing his daughter's respiratory arrest and resultant brain damage. His claim was denied and, on appeal, the Secretary of the Army affirmed the denial. As the Military Claims Act has no provision for judicial review, the Secretary's action ended the case against the United States. But does the claimant have a cause of action against the surgeon in his individual capacity?

The United States Army Claims Service (USARCS) was recently faced with the above situation. The determination of this issue requires interpretation of the Medical Malpractice Immunity Act of 1976,[2] also called the "Gonzales Act." Had the alleged malpractice occurred in the United States, the individual physician would have been immune from suit because subsection 1089(a) provides that a suit against the United States under the Federal Tort Claims Act (FTCA)[3] bars a personal action against military physicians. Subsection 1089(c) describes the procedure to be followed when a claimant sues an individual physician. Upon certification by the Attorney General that the physician was acting within the scope of his or her duties or employment, any action commenced in a State court will be removed to a United States district court, and the proceeding will be deemed a tort action against the United States.

The FTCA does not apply to claims arising in foreign countries, however,[4] In this instance, the only applicable statute is the Military Claims Act under which action by the Secretary of the Army is final.[5] No suit is allowed against the United States under the Military Claims Act.[6] Thus the question arises: although a claimant alleging medical malpractice overseas may not sue the United States if he is dissatisfied with the determination of his claim, may he sue the treating physician in his individual capacity?

[1] 10 U.S.C. § 2733 (1982); Dep't of Army, Reg. No. 27–20, Legal Services—Claims, ch. 3 (10 July 1987).

[2] 10 U.S.C. § 1089 (1982).

[3] 28 U.S.C. §§ 2671–2680 (1982).

[4] 28 U.S.C. § 2680(k) (1982).

[5] 10 U.S.C. § 2735 (1982).

[6] Broadnax v. United States, 710 F.2d 865 (D.C. Cir. 1983); Towry v. United States, 459 F. Supp. 101 (D. La 1978).

The first court of appeals case interpreting the Gonzales Act was *Jackson v. Kelly.*[7] Mrs. Jackson was a patient at the United States Air Force Hospital, Lakenheath, England. She sued her treating physician in the United States, alleging negligent treatment relating to her pregnancy. Based on other arguments not relevant to this analysis, the court held that, although he was acting within the scope of his employment, the physician was not entitled to immunity. In response to the physician's argument that the government should hold him harmless from liability by granting him official immunity under the Gonzales Act, however, the court proceeded to interpret the Act, although it noted that the Act was not made retroactive and did not apply to the facts of the case. The court held that, instead of granting absolute immunity from suit, Congress elected to have the government protect military physicians assigned to foreign countries through indemnity or insurance.[8] Under this interpretation, there are two distinct situations concerning military physicians acting within the scope of their duties: military physicians assigned within the United States are immune from suit under subsection 1089(a), and those assigned to foreign countries are not immune, but they may be relieved from liability by the government under subsection 1089(f). The court rejected the argument that subsection 1089(a) provides absolute immunity for military physicians, even when the FTCA does not apply, because such an interpretation would lead to the inevitable conclusion that subsection 1089(f) is superfluous. If military physicians assigned to foreign countries were to be immune from suit, the court went on, malpractice victims would lose any judicial remedy because there could be no suit against the physicians at all.

This interpretation was adopted by the Fourth Circuit in *Pelphrey v. United States.*[9] Mrs. Pelphrey filed suit under the FTCA for an allegedly negligent mastectomy performed by a Navy surgeon at the United States Navy Regional Medical Center in the Philippines. She contended that subsection 1089(f) of the Act extended coverage under the FTCA to medical malpractice claims arising in a foreign country. In rejecting the plaintiff's argument, the court, citing *Jackson,* held that Congress meant for liability insurance to protect military physicians from personal liability when the FTCA does not apply. Therefore, "military personnel acting in a foreign country are personally liable for malpractice because the FTCA does not apply to 'any claim arising in a foreign country'."[10]

In the two preceding cases, the courts interpreted subsection 1089(f) as providing an alternative to immunity in cases where the physicians are assigned in foreign countries. Neither court, however, made a distinction whether subsection 1089(f) was meant to protect physicians from liability in both U.S. and foreign courts, or only under the tort law system of foreign countries. The distinction is found in *Heller v. United States,*[11] decided on facts similar to those of *Pelphrey.* Interpreting subsection 1089(f), the Third Circuit held that, unlike their stateside counterparts, military physicians abroad may be personally liable under foreign law, and the purpose of this subsection is to indemnify physicians held liable by foreign courts.

Finally, in *Powers v. Schultz,*[12] the Fifth Circuit expressly held that subsection 1089(f) applies only to situations in which military physicians are liable under foreign law. Mrs. Powers, filed a claim for alleged negligent treatment of her son's meningitis at the United States Air Force Clinic, Rhein-Main Air Base, West Germany. When her claim was disapproved as barred by the limitations provision of the Military Claims Act, she filed an action in U.S. district court against the treating physician. In affirming the court's dismissal of the action, the Fifth Circuit held that the general intent of Congress in the Gonzales Act was to extend to personnel performing military service in the Armed Forces an immunity from suit while acting within the scope of their employment. This is an absolute immunity under subsection 1089(a). A suit against the United States under the FTCA is the exclusive remedy for claimants alleging negligent acts or omissions by military physicians acting within the scope of their duties. It does not matter that once subsection 1089(a) is determined to be applicable, a suit against the United States is not possible by virtue of the foreign country exception of the FTCA. The court interpreted the meaning of subsection 1089(f) not as an exception to the general immunity of military physicians, but as authorizing liability insurance to protect the physicians against suits filed in foreign courts.

In the preceding cases, military physicians were sued in the United States for acts performed while assigned to military hospitals overseas. Therefore, the interpretation by the courts of subsection 1089(f), either resulting in physicians not being exempt from suits (*Jackson*), or holding that physicians are absolutely immune from suits (*Powers*), are meant to apply only to this particular set of facts. Subsection 1089(f) also contains a provision dealing with military physicians "detailed for service with other than a Federal department, agency or instrumentality," for example, military physicians assigned for training purposes to a state or a city hospital. This part of subsection 1089(f) and its interpretation by the courts will not be analyzed in this article.

The claim described at the beginning of this article alleged substandard care at an Army hospital overseas resulting in respiratory arrest and mental retardation. The surgeon denied any negligence. Based on expert opinions

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[7] 557 F.2d 735 (10th Cir. 1977).

[8] 10 U.S.C. § 1089(f), interpreted by the court in this case, reads as follows:

(f) The head of the agency concerned or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

[9] 674 F.2d 243 (4th Cir. 1982).

[10] *Id.* at 246 (quoting 28 U.S.C. § 2680(k) (1982)).

[11] 776 F.2d 92 (3rd Cir. 1985).

[12] 821 F.2d 295 (5th Cir. 1987).

rendered at that time, USARCS found no evidence of negligence because the surgeon had anticipated respiratory problems due to blockage of the child's nostrils. He placed a suture at the base of her tongue with one end of the suture coming out of her mouth, and instructed the nurses to pull the suture if necessary, thereby advancing the tongue and providing air passage through the mouth. In any event, based on a preponderance of the evidence, USARCS found that the child's retardation was congenital and not caused by the respiratory arrest.

Upon final disapproval of his claim, the child's father filed suit in the United States District Court for the Western District of Washington. In the course of discussions with the United States Attorney's office, USARCS learned several facts that rendered the defense of the suit extremely risky. This suit was brought in 1986, before *Powers v. Schultz* was decided. Thus, *Jackson v. Kelly,* which held that a suit against an individual physician is proper under the circumstances described in subsection 1089(f) (*i.e.*, when the physician is assigned to a foreign country), seemed to be controlling. On the issue of negligence, the surgeon changed his statement and said that in retrospect he should not have assumed that three-month-old infants would spontaneously breathe through their mouths when their nostrils are blocked. Had he known that they lack the ability to breathe through their mouths, he would have used a different procedure in the application of the dressing to avoid blocking the child's nostrils. Finally, to rebut USARCS' finding on the issue of causation, the plaintiff's attorney submitted the opinion of a geneticist who had done extensive research on persons with cleft lip and cleft palate, and who had published a book on gene disorders. The book contains a compilation of approximately 250 cleft syndromes, or physical defects accompanying cleft lip and deriving from gene disorders.

In discussions with our consultants, we learned that people with cleft lip or cleft palate are in one of the following categories: those affected with a chromosomal disorder and as a consequence suffer from multiple defects including mental retardation; those with no defect other than the cleft lip or cleft palate condition; and a third category presenting normal chromosomes, but affected with a gene disorder accompanied by abnormal physical features and possible retardation. In his examination of the child, the plaintiff's expert found no abnormalities other than a repaired cleft lip and mental retardation. Under the circumstances, without additional syndromes, he concluded that the child's retardation was not related to her cleft lip condition, and therefore not attributable to a congenital disorder. He could not determine the cause of the child's mental retardation, however, although her respiratory arrest at the age of three months was one possible cause.

Asked to comment on the above evidence, our consultants also realized that the preceding testimony could be damaging to the defense if the suit were to proceed. Based on this reassessment of the case, it became apparent that the disapproval of the initial claim needed to be reassessed. After extensive discussions and upon approval by the Army Secretariat, USARCS representatives reached an agreement with the plaintiff's attorney in a structured settlement for the benefit of the child. This settlement, costing slightly in excess of $1 million, was approved upon reconsideration by the Assistant Secretary of the Army (Financial Management).

This case is an example of a successful suit against an individual physician for malpractice in a military hospital overseas. From a technical standpoint, there was no judgment for the plaintiff, but his previously denied claim under the Military Claims Act was reconsidered and approved, subsequent to which he withdrew his action. It must be emphasized, however, that the outcome of the case was mostly due to its particular facts, involving a change in the doctor's testimony and issues on which medical experts differ. At first, a causal relationship between the child's respiratory arrest and her mental retardation was not established by a preponderance of the evidence, but based on subsequently discovered evidence, that very causal relationship appeared to be more likely than not.

In spite of the above, a letter recently received at USARCS in a pending claim seems to indicate that attorneys for claimants will continue to assert that this cause of action against military physicians assigned to foreign countries is available to them, concurrently with an administrative remedy under the Military Claims Act. Whether they will succeed obviously depends on the meaning of subsection 1089(f) of the Gonzales Act, *i.e.*, whether *Powers v. Schultz* will be followed in other circuits.

Preserving an Affirmative Claim by Use of a Lien

Major Dennis Brower
Office of the Staff Judge Advocate, Fort Benning, Georgia
&
Major Bradley Bodager
Chief, Affirmative Claims Branch, USARCS

Recovery judge advocates (RJA) have several options available when attempting to recover for medical care provided to an injured party. A practice tip to consider in some circumstances is the filing of a lien through the local court system. This may be particularly useful when the insurance carrier or injured party's attorney do not respond to the RJA's assertion or request for a representation agreement.

In Georgia and Alabama, the state statutes provide for the establishment of liens upon the causes of action, claims,

or demands, accruing to the injured party.[1] These liens are based upon care provided by a hospital operating in the state and are a cause of action for that hospital against those liable to pay the patient damages.[2] To perfect the liens, the patient administrator, chief billing clerk, or other responsible party, need only prepare a verified statement asserting the basic facts of the hospital stay and the amount of the bill.[3] This notarized statement is then taken to the appropriate local judicial office and filed. There is a nominal fee for the filing.[4] The main problem in filing these liens is that both states have time limitations that require filing within a certain number of days after discharge from the hospital.[5]

To be able to file within the time limit, the RJA must have a close relationship with the local military hospital and have the patient administration section on the lookout for the significant third party liability cases. Your office often knows of major accidents or injuries from sources other than the hospital. When you discover a case that may be proper for filing a lien, notify the hospital and request the required cost data.

The key to using liens is to have your local military hospital involved. You must receive timely notice of the large and important cases before the injured party is completely discharged from the hospital's care. You will also need the cooperation of the hospital in preparing the verified statement of the hospital's costs.

Another way to approach these limitations is to argue that, although the injured party may have been discharged from the hospital as an inpatient, he or she has still been receiving treatment as an outpatient. This is especially true in our military hospitals where the billing is not separated into different segments such as laboratory charges, hospital fees, doctors fees, and radiology fees. Individuals released from a civilian hospital often have no further contact with that hospital and any follow-up visits are billed separately by their doctor.

In instances where a lien is determined to have been filed beyond the jurisdiction's time requirements, the act of filing may still have the desired result of having the recovery action reviewed.

It should be noted that, even if the medical costs could be the subject of a lien, the RJA should be selective in which cases to file. The filing of a lien in all cases would be ill-advised when other solutions are available. Each RJA will have to use his or her own judgment as to how recovery action would be best pursued. A few minutes of research can provide your office with the applicable statutory section for your jurisdiction and perhaps reveal an effective collection tool. A properly filed lien may provide the leverage needed in situations where there is a need for parties to more seriously consider government recovery assertions.

[1] Ala. Code § 35–11–370 (1975); Ga. Code Ann. § 44–14–470 (1982 & Supp. 1986).

[2] Georgia considers the right established by the lien to be analogous to the remedy provided by the garnishment laws. Ga. Code Ann. § 44–14–471 comment (1982).

[3] Ala. Code § 35–11–371 (1975); Ga. Code Ann. § 44–14–471 (1982 & Supp. 1986).

[4] The filing fee for Georgia is $2.00 and in Alabama $1.00. The local Georgia clerk's office has agreed to bill this office on a monthly basis. This arrangement makes it easy to file the liens and does not create a problem with finance.

[5] The time limitations in Georgia and Alabama are 30 and 10 days, respectively, from the day of discharge from the hospital.

Claims Notes

Personnel Claims Note

This note is designed to be published in local command information publications as part of a command preventive law program. It should be adapted to include local policies.

It has been wisely said that "locks are for honest people." The saying means substantially that an otherwise honest person may be tempted to steal property that is unprotected and easy to take, but if the same property were locked up, and hence difficult to take, that same person would entertain no thought of breaking the lock and stealing. Let's face it, if a car thief wants to steal your car badly enough, the fact that the doors, windows, and ignition are locked won't stop him at all. On the other hand, a car with the key in the ignition is a temptation to a passing juvenile who would not bother if it were locked. This same principle applies to life in the barracks. Military police reports reveal very few thefts in which wall lockers, foot lockers, or rooms have been forced open. Those same police reports show numerous thefts of property that was lying on a bunk, dresser, or hanging up and unattended. Most barracks thieves are eventually caught and many of them have no prior incidents of criminal conduct. Invariably they say, "it was just lying there, so I took it." Often they add, "I don't know why." By keeping your property locked up when unattended, you will be protecting yourself from losses by theft and at the same time you will be assisting in crime prevention.

Tort Claims Note

Recent FTCA Denials

Dismissal from Civilian Position. A Department of Army civilian employee in Germany was dismissed from his job following an accusation of theft of Army property he claimed was abandoned. He was not brought to trial and had returned to the United States. He claimed under the Military Claims Act for personal injury, *i.e.*, emotional trauma, loss of employment and salary (mostly for time spent in pretrial confinement in a German jail) and property loss. The claim is excluded by the discretionary function exception. He can challenge his dismissal only

through Civil Service procedures. Additionally, claims for emotional trauma and time spent in jail are in effect claims for libel, slander and false imprisonment, and thereby barred.

Failed Diagnosis. A claim for injuries, including loss of childbearing capability, resulting from a ruptured ectopic pregnancy that was not diagnosed on the initial and only visit to the emergency room was denied where the rupture probably occurred after the ER visit. Such a diagnosis is difficult and rarely made on the initial visit. Even where there is no rupture, normally the fallopian tube is removed unless there is no remaining healthy tube and the patient desires to have children through natural means. In this case there was a healthy tube, and the injury was probably the result of the patient's delay in returning for additional treatment.

Ordnance Explosion. A claim was denied for damage to an explosive ordnance transport as a result of the explosion of unfused aerial bombs caused by a fire after the transport collided with a POV. The claimant also alleged that he had to go out of business as a result of the investigation that followed and that the collision caused his removal from the list of approved transporters. The unfused bombs were properly loaded and incapable of being exploded except by exposure to high heat over a period of time. The removal of the owner from the list of approved transporters is clearly within the discretionary function exception.

ROTC Training. A claim was denied for injuries to a senior ROTC cadet that were incurred while he was engaged in hand-to-hand combat training during weekend training at an Army post. His original claim under the Federal Employees' Compensation Act (FECA) was denied. There was no tort; *i.e.*, there was no wrongful or negligent act or omission on the part of an employee of the United States and thus no basis for payment under the FTCA. The claimant was advised to appeal the denial of his FECA claim, which could be payable if he was engaged in essential training required for commissioning. Normally, such claims under FECA are limited to those injuries incurred during summer training.

Claims Management Note

Changes in Claims Office Organization

Two changes have been made in the status of Army claims offices. Fort Buchanan, Puerto Rico, formerly a claims processing office under the supervision of Fort McPherson, became an area claims office effective 1 February. Fort Buchanan is now responsible for Area 45, a new area that includes Puerto Rico and the Virgin Islands. For automation purposes, Fort Buchanan will continue to use its present office code (272) until the end of the fiscal year. Beginning 1 October 1988, Fort Buchanan will use office code 451.

The Kitzingen Branch, 3rd Infantry Division Staff Judge Advocate Office, a claims processing office, has been given claims approval authority. The Kitzingen claims office has been assigned office code E33, effective immediately.

Please note these changes in Annex A, Claims Manual, until such time as the Claims Manual is updated.

Criminal Law Note

Criminal Law Division, OTJAG

Admissibility of Evidence Reminders

When Military Rule of Evidence 402 was adopted, the drafters noted that it was "potentially the most important of the new rules."[1] Rule 402 allows *all* relevant evidence to be admitted unless the evidence violates: (1) the Constitution, as applied to the military; (2) the Uniform Code of Military Justice; (3) the Manual for Courts-Martial; (4) the Military Rules of Evidence, or (5) any act of Congress applicable to members of the armed forces.[2] The importance of Rule 402, as envisioned by its drafters, and its application at courts-martial are apparently being overlooked in many instances by counsel and military judges.

Unless one of the five exceptions to MRE 402 applies to a factual situation, relevant evidence should be admitted. For example, Army Regulation 600–85 requires an observer for soldiers providing urine samples to directly view the soldier urinating into the specimen bottle.[3] In a prosecution for wrongful use of an illegal drug based upon a urinalysis, if the observer testifies at trial that he or she did not directly observe the urine flow into the bottle, but does testify that the accused was the only one at the urinal and that the accused personally gave the bottle containing what appeared to be urine to him or her, then does the lack of direct observation make an otherwise valid chain of custody document inadmissible? A chain of custody, like other items of evidence, may be proven by either direct or circumstantial evidence. Under the facts presented, the circumstances give rise to the inference that the urine came only from the accused. Under Mil. R. Evid 401,[4] the chain of custody document is surely relevant. Under Rule 402, no exclusionary provision is present; therefore, notwithstanding a regulatory violation, the document should be admitted. The

[1] Mil. R. Evid. 402 analysis.

[2] Mil. R. Evid. 402.

[3] Dep't of Army, Reg. No. 600–85, Personnel—General—Alcohol and Drug Abuse Prevention and Control Program, para E–6 (3 Nov. 1986).

[4] Mil. R. Evid. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.). *See generally* Dep't of Army, Pamphlet No. 27–22, Legal Services—Military Criminal Law Evidence, ch. 8 (15 July 1987).

absence of direct observation goes only to the weight to be given to the chain of custody, not towards its admissibility.

Counsel and military judges must remember that admissibility is not dependent upon proof beyond a reasonable doubt. A military judge needs to only follow a simple guide to determine the admissibility of evidence not otherwise precluded by one of the exceptions within Rule 402:

> Will the court members believe this evidence might be helpful in deciding the case accurately? If the answer is "no," the judge excludes the evidence as irrelevant under Rule 402. If the answer is "yes," the judge asks another question: Is there sufficient evidence to warrant a reasonable court member in concluding that it is to be believed? If the answer is "no," the evidence is excluded. If the answer is "yes," the evidence is admitted. It is very important that the judge not decide whether *he* believes the evidence . . .; the judge only decides whether a reasonable court member could believe it.[5]

Also, counsel and military judges need to remember that when the judge makes determinations about the admissibility of evidence, "the military judge is not bound by the rules of evidence except those with respect to privileges."[6] Hence, a trial judge may rely on otherwise inadmissible evidence to support the admissibility of offered evidence.[7] It may be an appropriate time for judge advocates to reevaluate their trial techniques and not to rely on instincts or past practices, but to utilize specific provisions of the Military Rules of Evidence. Major Holland.

[5] S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 46 (2d ed. 1986).

[6] Mil. R. Evid. 104(a).

[7] *See, e.g.*, United States v. Yanez, 16 M.J. 782, 784 (A.C.M.R. 1983) (unauthenticated record of trial was considered by military judge when ruling on the admissibility of a promulgating order).

Automation Notes

Information Management Office, OTJAG

Progeny of Bug Alert

In the December 1987 edition of *The Army Lawyer*, at 49, an article entitled "Bug Alert" described and offered a solution for a bug in the LAAWS Main Menu program. Several alert and astute fans of automation detected a typographical error in this article.

Step 9 of the fixit procedure in the December article looks like this:

9. Now type:

to DW4GO

The screen should look like this:

13: if exist dw4a0*.* go to DW4GO
13: if exist dw4a0*.* go to DW4GO

This is incorrect. The command is "goto" with no space between the words. The last line should read

13: if exist dw4a0*.* goto DW4GO

Follow the rest of the procedure as outlined in the December note and you should be all set. Thanks to all the folks who detected the original error in the menu and pointed out this typo.

ALPS Single Sheet Feeder Problems

The ALPS P2000G dot matrix printer is extremely versatile. It is capable of using stacks of cut paper, such as letterhead, or continuous fanfold paper. Unfortunately, most people have had difficulty using the single sheet feeder configuration. Often, the top of the sheet being fed through will catch on the plastic cover and jam, leading to wasted paper, frayed nerves, and abandonment of the cut sheet feeder.

Zenith Data Systems has solved this annoying problem with the "Single Sheet Paper Deflector Strip." This plastic strip comes with complete instructions, is easy to install, and (most importantly) will prevent the jamming described above.

Be the first on your block to get this FREE remedy! Simply motivate your local automation coordinator to pick up the phone and order a bundle from Mr. Charles Blackmore of Zenith Data Systems at 800–582–0030, extension 296. What could be easier?

JAGC Defense Data Network Directory

This is the third printing of the JAGC Defense Data Network (DDN) Directory. It supersedes the list in *The Army Lawyer*, Oct. 1987, at 62. It lists electronic addresses for JA offices and JA personnel having the ability to communicate using the DDN. As more locations gain identities on the network, their addresses will be added to the directory. Corrections to information contained in this directory should be sent to: Office of The Judge Advocate General, HQ, Department of Army, ATTN: DAJA–IM, The Pentagon, Washington, D.C. 20310–2216.

DDN is a worldwide network designed to meet the data communication requirements of the Department of Defense and to satisfy the performance needs of computer system users who require data communication services. As users of a DDN host computer, offices with DDN addresses have the ability to send electronic mail (E-mail) to all other users on the DDN.

Instructions on how to use E-mail can be obtained from your DDN host computer management office. Normally, mail sent thru the DDN is addressed in the following manner: To: mailer!<addressee's username@computer host name>.

As E-mail and electronic bulletin boards become more available, JA offices should be ready to take advantage of this increased communication capability. All it takes is a PC, a modem, and a DDN address.

Office of The Judge Advocate General

Office of The Judge Advocate General
HQDA, The Pentagon
Washington, D.C. 20310–2200

Office DDN Address: DROTHLISB@OPTIMIS–PENT.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS DDN host computer. E-mail to them should be addressed in the following manner:

MAILER!<USERNAME@OPTIMIS–PENT. ARPA>

Owner	*Username*
Office: Administrative	
EGOZCUE, CW3 JOSEPH	EGOZCUE
Office: Administrative Law	
BLACK, MAJ SCOTT	BLACK
BLOCKER, JILL MS	BLOCKER
CONTENTO, CPT DENISE	DAJA_AL1
HORTON, MAJ VICTOR	HORTON
HOWARD, CYNTHIA MS	CHOWARD
MANUELE, MAJ GARY	GMANUELE
MURDOCH, CPT JULIE	MURDOCH
PLOTKIN, MAJ JOHN	PLOTKIN
POPESCU, MAJ JOHN	POPESCU
SMYSER, COL JAMES	SMYSER
STAMETS, MR ERIC	STAMETS
WAGNER, CPT CARL	DAJA_ALP1
WHITE, MAJ RONALD	RWHITE
WOODLING, MAJ DALE	WOODLING
Office: Contract Law	
MACKEY, COL PATRICK	PMACKEY
SCHWARZ, MAJ PAUL	SCHWARZ
Office: Criminal Law	
CAPOFARI, MAJ PAUL	DAJA_CL1
EVANS, CARLENE MS	EVANSC
JOHNSON, VERONICA MS	JOHNSONV
MILLARD, MAJ MICHAEL	MILLARD
Office: Information Management	
HOLDEN, MAJ PHILIP	HOLDEN
ROTHLISBERGER, LTC D	DROTHLISB
Office: International Affairs	
CARLSON, MAJ LOUIS	LCARLSON
CHADA, MS GINGER	DAJA_IA
Office: Legal Assistance	
KIRBY, LAURELLET MRS	KIRBY
Office: Litigation	
ISAACSON, MAJ SCOTT	ISAACSON
Office: Personnel, Plans, & Training	
MARCHAND, LTC MICHAEL	MARCHAND
Office: Procurement Fraud	
MCKAY, MAJ BERNARD	MCKAY
Office: Records & Research	
BAKER, MS BARBARA	BBAKER
GRAY, MS JACKIE	GRAY

U.S. Army Legal Services Agency

U.S. Army Legal Services Agency
Nassif Building
5611 Columbia Pike
Falls Church, VA 22041–5013

Office DDN Address: BRUNSON@OPTIMIS–PENT.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS host computer:

Owner	*Username*
BRUNSON, MAJ GIL	BRUNSON
CARLSNESS, SFC G	CARLSNESS
COSGROVE, MAJ C	JALS-TD
CROW, MAJ PATRICK	CROW
DITTON, CPT MICHAEL	DITTON
EMERY, SGT STEVEN	JALS_TJ
FULTON, MR WILLIAMS	FULTON
HARDERS, MAJ ROBERT	HARDERS
HOWELL, COL JOHN	HOWELLJ
KAPANKE, MAJ CARL	KAPANKE
KINBERG, MAJ EDWARD	KINBERG
LYNCH, MAJ JAMES	JALS_CA2
MELVIN, CPT BOBBY	MELVIN
MIEXELL, LTC JOHN	JALS_TCA
PELLETIER, MAJ RI	RPELLETIER
STOKES, MAJ WILLIAM	WSTOKES

The Judge Advocate General's School

The Judge Advocate General's School
Charlottesville, VA 22903–1781

Office DDN address: DODSON@OPTIMIS–PENT.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS host computer:

Owner	*Username*
BILLINGSLEY, SFC GLENN	BILLINGS
BUNTON, SFC LARRY	BUNTON
CAYCE, CPT LYLE	CAYCE
DODSON, CPT DENNIS	DODSON
GARVER, CPT JOHN	GARVER
GETZ, CPT DAVID	GETZ
GUILFORD, MAJ J	GUILFORD
HAYNES, MAJ TOMMY	JAGS_SSA1
JEPPERSON, MAJ JON	JAGS_DDC1
KULLMAN, COL T	KULLMAN
OLDAKER, MS HAZEL	OLDAKER

SCHOFFMAN, MAJ ROBERT	SCHOFFMAN
ZUCKER, LTC DAVID	ZUCKER

U.S. Army Claims Service

U.S. Army Claims Service
Building 4411
Fort Meade, MD 20755

Office DDN Address: JACS_IMO1@OPTIMIS-PENT.ARPA

Owner	*Username*
WESTERBEKE, MR G.	JACS_IMO1

U.S. Army Recruiting Command

Command Legal Counsel, Bldg #48A
U.S. Army Recruiting Command
Fort Sheridan, IL 60037-6000

Office DDN Address: USAREC@DDN2.ARPA

U.S. Army Strategic Defense Command

U.S. Army Strategic Defense Command
P.O. Box 1500
Huntsville, AL 35807-3801

Office DDN Address: JONESJ@OPTIMIS-PENT.ARPA

U.S. Army Strategic Defense COMMAND2
1941 Jefferson Davis Highway
P.O. Box 15280
Arlington, VA 22215-0150

Office DDN Address: DGRAY@OPTIMIS-PENT.ARPA

U.S. Army Training & Doctrine Command

Office of the Staff Judge Advocate
HQ, USA Signal Center & Fort Gordon
Fort Gordon, GA 30905-5280

Office DDN Address: MLANOUE@OPTIMIS-PENT.ARPA

Office of the Staff Judge Advocate
HQ, US Army Air Defense Artillery Center & Fort Bliss
Fort Bliss, TX 79916-5000

Office DDN Address: HOLMES@OPTIMIS-PENT.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS host computer:

Owner	*Username*
TUDOR, CPT RONNIE B.	TUDOR
HOLMES, MSG RAY	HOLMES

U.S. Army Forces Command

Staff Judge Advocate
HQ, 7th Infantry Division & Fort Ord
ATTN: AFZW-JA
Fort Ord, CA 93941

Office DDN Address: BOULANGER@OPTIMIS-PENT.ARPA

Staff Judge Advocate
U.S. Army Garrison
Fort Devens, MA 01433-5050

Office DDN Address: AFZD_JAO@OPTIMIS-PENT.ARPA

Staff Judge Advocate
HQ, 1st Cavalry Division
Fort Hood, TX 76545

Office DDN Address: AFZA_SJA.ARPA

U.S. Army Europe & Seventh Army

Office of the Judge Advocate
U.S. Army Europe & Seventh Army
APO New York 09403-0109

Office DDN Address: JA@USAREUR-EM.ARPA

Owner	*Username*
BROWN, MS VIRGINIA	BROWNV
WELSH, CW2 MICHAEL	WELSHM

U.S. Army Japan

Office of the Staff Judge Advocate
HQ, USA, Japan
Camp Zama Japan
APO SF 96343

Office DDN Address: AJJA@ZAMA-EMH.ARPA

Office of the Staff Judge Advocate
10th Area Support Group
Torrii Station, Okinawa, Japan
APO SF 96331-0008

Office DDN Address: AJGO-SJA@BUCKNER-EMH.ARPA

U.S. Army Korea & Eighth Army

Office of the Judge Advocate
HQ, US Forces, Korea
APO SF 96301

Office DDN Address: USFK-JAJ@WALKER-EMH.ARPA

Owner	Username
RUNYON, CW3 Brad	RUNYON

HQ, 19th Support Command
APO SF 96212-0171

Office DDN Address: HQ19-SJA@WALKER-EMH.ARPA

HQ, 2D Infantry Division
APO SF 96224-3927

Office DDN Address: JAJ-2@WALKER-EMH.ARPA

USA Forces Claims Service, Korea
APO SF 96301

Office DDN Address: JAJ-CLAIMS@WALKER-EMH.ARPA

U.S. Army Material Command

Commander
Anniston Army Depot
Legal and Claims Office
Anniston, AL 36201-5005

Office DDN Address: 1MASON@ANAD.ARPA

Office of the Staff Judge Advocate
HQ, U.S. Army Aviation Systems Command
4300 Goodfellow Blvd.
St. Louis, MO 63120-1798

Office DDN Address: AMSAVJL@AVSCOM.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS host computer:

Owner	*Username*
COL ROGER G. DARLEY	RDARLEY@ AVSCOM.ARPA

Commander
U.S. Army Dugway Proving Ground

ATTN: STEDP-JA
Dugway, UT 84022-5000

Office DDN Address: STANGLER@DPG-1.ARPA

Office of the Chief Counsel/SJA
HQ, U.S. Army Test & Evaluation Command
ATTN: AMSTE-JA
Aberdeen Proving Ground, MD 21005-5055

Office DDN Address: AMSTELO@APG-4.ARPA

Office of the Command Judge Advocate
U.S. Army Yuma Proving Ground

ATTN: STEYP-JA
Yuma, AZ 85365-9102

Office DDN Address: STEYPJA@YUMA.ARPA

U.S. Army Military Traffic Management Command

Staff Judge Advocate
HQ, Western Area, MTMC
Oakland Army Base
Oakland, CA 94626-5000

Office DDN Address: AABWRM@NARDACVA.ARPA

Bicentennial of the Constitution

Ratification of the Constitution

The Commission on the Bicentennial of the United States Constitution has announced that the area of emphasis for 1988 is the "Ratification Process." This facet of constitutional history is colorful and exciting. It presents the perfect opportunity for military attorneys, especially attorneys in the National Guard or the Army Reserve who practice in one of the thirteen original states, to contribute to the Department of the Army goal of educating our soldiers and their family members. Interested attorneys are invited to submit vignettes or short articles dealing with the history of how their state handled ratification to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville VA 22903-1781. Submissions will be considered for publication in a future issue. Where appropriate, the article should discuss issues of interest to the military audience.

Call for Scholarly Papers in Honor of the Bicentennial of the Constitution

To honor the Bicentennial of the United States Constitution, the Public Contract Section of the American Bar Association is sponsoring a writing competition on a series of constitutional issues of major concern to the government contracting community. The Section solicits scholarly papers on constitutional issues in government contracting, including, for example, these seven constitutional topics:

1. The Constitutionality of the United States Claims Court. Since the court's organization as an Article I forum, its constitutionality has remained in doubt. Especially in the wake of recent rulings by the Supreme Court, certain functions of the court—contract disputes, taking claims, and the like—may stretch the permissible boundaries of the separation of powers doctrine. *See Gregory Timber Resources*, AGBCA No. 84-319-1, 84-320-1 (decided August 26, 1987).

2. The Constitutionality of Multiyear Appropriations. Appropriations to the Departments of Defense and Energy which extend for more than two years may be fatally inconsistent with the limitations of Article I, section 8, clause 12.

3. The Constitutionality of Augmenting Appropriations. The subtle but highly problematic implications of Article I, section 9, clause 7, suggest significant separation of powers issues in both the foreign policy and national defense arenas: Are "cost-sharing" contracts between industry and the Defense Department consistent with Congress' control over the government's purse strings? May the Executive Branch augment appropriations by inducing voluntary work, contributions, or other forms of nonappropriated measures?

4. The Constitutionality of the Administrative Adjudication Scheme in the Program Fraud Civil Remedies Act. In April 1987, the Supreme Court narrowly defined the circumstances in which the United States may apply penal statutes without affording a jury trial before an Article III court, under the seventh amendment. In light of *Tull v. United States*, is this statute constitutional?

5. The Constitutionality of GSBCA Adjudication of Bid Protests under the Brooks Act. In this area, the Board may be viewed as an Article I court performing Executive Branch functions, without proper control from within the Executive Branch in violation of the separation of powers doctrine. *See Gregory Timber Resources.*

6. The Constitutionality of the Suspension and Debarment Provisions of the Federal Acquisition Regulation. What does the due process clause of the fifth amendment of the Constitution require before a contractor may be prohibited from doing business with the federal government?

7. The Constitutional Implications of Contractor Investigations and Related Activities. Can corporate internal investigations of alleged government contract wrongdoing have sufficient governmental involvement to constitute "state action" for purposes of invoking Bill of Rights guarantees of employees implicated in the investigation?

Papers should be between twenty and forty typewritten double-spaced pages, in the format prescribed for the *Public Contract Law Journal*, and should be submitted no later than May 15, 1988. The most thorough and analytical papers received will be published in a special issue of the *Public Contract Law Journal*. The most meritorious paper, judged to contain an outstanding overall treatment of the author's chosen subject matter, will receive a cash prize of $1,000.

One or more of the subjects will be considered for a debate to be conducted as part of the Section's program at a

quarterly Section meeting or the 1988 ABA Annual Meeting. The authors of published papers will be given the opportunity at this debate to defend their respective theses.

The papers submitted will be judged by the members of the Public Contract Section's Special Committee on the Bicentennial of the Constitution. Further details are available from the Secretary to the Committee, David A. Churchill, 1575 Eye Street, N.W., Washington, D.C. 20005, (202) 789–7559.

Constitutional Bibliography

The Department of the Army and the National Commission on the Bicentennial of the Constitution will be observing the Constitution's bicentennial until 1991. During this observance, many judge advocates will be asked to teach classes, give speeches, or write articles about the Constitution and its meaning to Americans today.

This bibliography is an addition to the resource packet previously made available to staff judge advocates (*see The Army Lawyer*, Dec. 1986, at 66), and the first bibliography (*See The Army Lawyer*, Mar. 1987, at 59). It is an introduction to the vast amount of literature that has been written about the history and operation of the United States Constitution. Book titles include the publisher and year of printing.

This year's bibliography also includes video tapes that are available for purchase or rental, and books written especially for school children. The listing of a book, article, or video tape in this bibliography does not constitute a Department of the Army endorsement.

Books

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M. Whicker, R. Strickland & R. Moore, The Constitution Under Pressure: A Time for Change (Praeger Pub. 1987).

Video Tapes

The Blessings of Liberty (1 video cassette, purchase) (Mail Order Department, Eastern National Parks and Monuments, 313 Walnut St., Philadelphia, PA 19106, telephone 1–800–887–7777).

Congress: We the People (13 video cassettes, purchase) (Films Inc., Education Division, 5547 N. Ravenswood Ave., Chicago, IL 60640–9979, telephone 1–800–323–4222, ext. 43).

The Constitution and the Courts: Text, Original Intent and the Changing Social Order (1 video cassette, purchase) (Project '87, 1527 New Hampshire Ave., N.W., Washington, D.C. 20036, telephone (202) 483–2512).

The Constitution: That Delicate Balance (6 video cassettes, free rental) (American Association of Retired Persons, AARP Program Scheduling Office, Program Resources Department AP, 1909 K Street N.W., Washington, D.C. 20049, telephone (202) 662–4895).

The Constitution: That Delicate Balance (13 video cassettes, purchase) (Films Inc., Education Division, 5547 N. Ravenswood Ave., Chicago, IL 60640–9979, telephone 1–800–323–4222, ext. 43).

A Design for Liberty: The American Constitution (1 video cassette, free rental) (Modern Talking Pictures, 5000 Park Street North, St. Petersburg, FL 33709, telephone (813) 541–5763).

Mr. Madison's Constitution and the Twenty-first Century (1 video cassette, purchase) (Project '87, 1527 New Hampshire Ave., N.W., Washington, D.C. 20036, telephone (202) 483–2512).

Signers of the Constitution (1 video cassette, free) (Captain Boggs, U.S. Army Command Information Unit, Electronic Media Branch, Bldg. 160/2, 2nd & M Sts., S.E., Washington, D.C. 20315–0300, telephone (202) 433–2404).

This Constitution: A History (5 video cassettes, rent or purchase) (International University Consortium, The University of Maryland University College, University Blvd. at Adelphi Rd., College Park MD 20742–1612, telephone (301) 985–7811).

We the People (4 video cassettes, purchase) (Films for the Humanities, Inc., P.O. Box 2053, Princeton, NJ 08543, telephone 1–800–257–5126).

Other video cassettes relating to the Bicentennial that have been produced by the Department of the Army may be available from your installation TASC.

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Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Reserve Component General Officer Responsibilities

The tasking letter from Major General Hugh R. Overholt, The Judge Advocate General, to Brigadier General Thomas P. O'Brien, Jr., Chief Judge, USALSA (IMA), is reprinted beginning on page 57. This letter should instill an appreciation for the responsibilities fulfilled by our Reserve Component general officers. A tasking letter of this type will be issued to all new Reserve Component general officers early in their tenure.

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

November 30, 1987

REPLY TO
ATTENTION OF

JAGS-GRA

Brigadier General Thomas P. O'Brien, Jr.

Dear General O'Brien:

As you know, many of us, including Major General Suter, the Reserve Component Brigadier General's Mission Statement Committee, you and the other Reserve Component Judge Advocate general officers, have been considering how to maximize the benefit of the RC general officers to the Reserve Components, the Judge Advocate General's Corps, and the Army. Although the official job description for your position covers in broad scope duties for peacetime, mobilization and postmobilization, I see the need for a mission tasking letter to best use your superior talent during your tour of duty as the Chief Judge, United States Army Legal Services Agency (IMA). I will develop a mission tasking letter for each Reserve Component JA general officer early in his tenure and thereafter as needed under the circumstances. This letter does not replace the job description but is a tool for identifying areas and specific tasks needing current emphasis.

You are requested during your tour to emphasize the tasks and areas of responsibilities specified below.

1. As early as possible in your tenure, schedule a day of briefings with the Judge Advocate Guard and Reserve Affairs Department (GRA), The Judge Advocate General's School. The Director, GRA, will provide you with a broad spectrum of information on my responsibilities in the Reserve component JAGC.

2. Maintain current knowledge regarding emergency mobilization plans and the sufficiency of mobilized USAR Judge Advocates to meet the needs of a mobilized force. To receive an overall view of mobilization plans, you should request a briefing from the Mobilization Operations Center at ARPERCEN in St. Louis which can provide in-depth information on the mobilization process. A briefing by the FORSCOM SJA to acquaint you specifically with CAPSTONE and FORSCOM's role in mobilization from a JAGC perspective will provide you valuable insight.

3. Participate in personnel management operations by providing input to GRA, upon their request, on assignment of judge advocates to military judge detachments and on the unusually difficult senior officer assignment issues, i.e., those involving special circumstances.

4. Monitor implementation of the premobilization legal counseling program for the USAR.

5. Visit key OCONUS (USAREUR) commands' SJAs once during your tenure and review with the senior JA in the command the plans for use of RA JAs during ODT, including OCONUS exercises, and more importantly during execution of plans, both before and after mobilization. The concerns of USAREUR SJAs must be identified to make us aware of trouble spots. Preparation for your visit should include a discussion with the FORSCOM SJA who should also be consulted upon completion of the visit. The USAREUR and FORSCOM SJAs are critical in the judge advocate CAPSTONE scheme.

6. Make Article 6 styled visits on my behalf. Article 6 styled visits can provide a more complete picture of training, morale, and readiness of reserve judge advocates serving in reserve units. While I am aware that resources greatly limit the frequency of these visits, I would like to have them initiated during your tenure. Some appropriate situations for these visits include:

a. Visits to JA sections during IDT. Although the On-Site attendance is important, additional visits to key JA sections as well as JAGSOs during IDT and other relevant times are needed. In the last year of each of their tenures, Brigadier Generals Thorn and Fouts visited several training divisions, engineer commands, and JA sections in other units. The results were beneficial. I desire to see them formalized as Article 6 styled visits on my behalf.

b. Identify key JA sections or elements with the greatest need for the Article 6 styled visits. Once the units are identified, coordinate with the other RC JA BGs to set up a visitation schedule, which will be maintained by the senior RC JA general officer. Practicalities may be such that an identified JA section will receive a general officer visit only once in three years. Even so, the process needs to begin. The identification of units and scheduling of visits will be left largely within the RC JA general officer's discretion. The demands on their time and practices are recognized.

c. On-Sites. Continue to coordinate with other RC JA general officers to ensure attendance of one general officer at each session. Normally only one general officer should attend any one On-Site as attendance by more than one may not be the most efficient use of the general officers' time. One or more ARCOM SJAs or MLC commanders or other RC SJAs will be present at On-Sites. On-Site attendance by the RC JA general officers should be used as an opportunity when possible to conduct the Article 6 styled visit. When feasible, the headquarters or other physical facility may also be visited.

d. Checklist. In coordination with the FORSCOM SJA, GRA, and the other RC JA general officers, develop and maintain a checklist to assist in conducting the visit. This will probably be in the nature of the checklist used for Article 6 visits to active component elements. The checklist will likely need tailoring for each type of unit. It should be developed to assist in the assessment of the state of training, readiness, morale, and discipline of RC JA personnel.

7. Use Article 6 styled visits to the extent useful and practical to gain more insight into the adequacy of training. Training is a critical element of preparation for mobilization readiness. You should prepare, as part of your end-of-tenure report, an evaluation of the effectiveness of all facets of RC JA training. In the evaluation, advise me on the scope and sufficiency of the training programs available.

8. Coordinate to ensure that one of the Reserve Component JA general officers makes a preparatory visit to any JA elements scheduled for overseas deployment training (ODT). This will enhance the training and help to prevent problems. The general officer designated to make the visit should coordinate with the FORSCOM and CONUSA SJAs on the scheduling of a preparatory visit.

9. Attend a Quarterly Review and Analysis in my office as early in your tenure as practicable. This will better equip you to share with USAR and ARNG personnel current information about what is going on in the Active Component JAGC.

10. Participate as requested by TJAG in mobilization and deployment exercises, either at HQDA or as an observer at other headquarters.

11. Review each RC study committee recommendation and make recommendations for implementation as appropriate.

12. Make recommendations as requested on the placement and/or relocation of JAGSOs.

13. Prepare for your mobilization and postmobilization duties.

14. Upon request, provide JAG interface with the civilian community including organizations such as the civilian bar and the Reserve Officer's Association.

15. When requested, represent me at meetings of the Army Reserve Forces Policy Board.

16. Provide me a projected annual travel itinerary through the Judge Advocate Guard and Reserve Affairs Department with adjustments as appropriate through the same channel.

17. Provide me an end-of-tenure report including your observations and recommendations pertaining to the status and appropriate direction of the Reserve Component JAGC.

Implementation of these taskings is trusted to your discretion. In the final analysis, the RC JA general officer will have to determine the availability of his time resources and set priorities accordingly. I feel that your knowledge of Reserve Component matters, with emphasis on the items I have enumerated, will result in significant improvement in the total JAGC and its ability to accomplish the legal missions of the Army upon mobilization.

Sincerely,

Hugh Overholt

Hugh R. Overholt
Major General, U.S. Army
The Judge Advocate General

Judge Advocate Officer Basic Course

Newly appointed Reserve Force (USAR/ARNG) JAGC officers have conditional appointments to complete OBC within 12 months of the date of appointment. Those officers who will not complete JAOBC within the 12 month time limit should request an extension. Requests should be in writing and be directed to the Commandant, TJAGSA, ATTN: JAGS–GRA, Charlottesville, Virginia 22903–1781. For those officers who have not attended any other resident OBC, attendance at the JAOBC Phase I at Fort Lee, Virginia is required. The next Phase I training will be 11–22 July (reporting on 10 July). USAR Troop Program Unit officers required to attend Phase I OBC should request the training through their unit on a DA Form 1058. ARNG officers should request attendance on a NGB Form 64 through ARNG Operating Activities Center, Military Education Branch at Aberdeen Proving Grounds. USAR non-TPU officers should request attendance through their JAG PMO at ARPERCEN (1–800–325–4916).

For those officers who would like to attend the resident Phase II OBC at The Judge Advocate General's School in Charlottesville, Virginia, application should be made in the same manner as the request for Phase I. Phase II OBC students report in to TJAGSA on 22 July, with graduation on 28 September 1988.

For additional course information, refer to DA Pam 351–4, Formal Schools Catalogue, Chapter 2, The Judge Advocate General's School, course number 5–27–C20, 10 weeks; The Quartermaster School, Phase I, The Judge Advocate General Officer Basic, course number 5–17–C20, 2 weeks.

Assignment to USAR JAGC Positions

There are 77 tenured JAGC positions in USAR Troop Program Units. These positions include the Military Law Center commander and the senior staff judge advocate positions in ARCOMs and GOCOMs. The Judge Advocate General's approval is required for assignment to any of these positions (AR 140–10, Section VI). A list of the officers currently holding these positions and the vacancy dates is included at the end of this note.

The procedure for filling these positions requires that the unit take action at least nine months prior to the end of the incumbent's tenure. The first step should be to advertise the impending vacancy in unit bulletins or newspapers and ensure that qualified IRR members in the area know that they may apply for the position. A list of eligible officers in commuting distance of the unit may be obtained from Guard and Reserve Affairs at TJAGSA (1–800–654–5914, extension 380). A list of eligible officers can also be obtained by initiating a Request for Unit Vacancy Fill (DA Form 4935–R). The DA Form 4935–R can be sent to the MUSARC, adjacent MUSARCs, and ARPERCEN (ATTN: DARP–MOB–C). The unit should nominate at least three candidates. The nomination packets should contain a list of all officers considered and a description of the efforts to publicize the vacancy. The following information must be submitted for each officer nominated:

a. *Personal data:* Full name (including preferred name if other than first name), grade, date of rank, mandatory release date, age, address, telephone number (business and home), full length official photograph.

b. *Military experience:* Chronological list of Reserve and Active Duty assignments; copies of Officer Evaluation Reports for the past 5 years (including senior rater profile).

c. *Awards and decorations:* Copies of all awards and decorations; significant letters of commendation.

d. *Military and civilian education:* Schools attended, degrees obtained, dates of completion, and any honors awarded.

e. *Civilian experience:* Resume of legal experience.

Nominations will be forwarded through the chain of command to arrive at TJAGSA (ATTN: JAGC–GRA, Charlottesville, VA 22903–1781) at least six months before the tenure expires. Tenure for these positions is three years and officers selected are expected to serve the full three years. No extensions of the tenure period will be granted unless no other qualified officers are available or if there will be an adverse impact on the mission of the unit. Officers in the appropriate grade for the assignment have priority. An 0–5 will not be selected if a qualified 0–6 is available for a position authorized an 0–6. Officers will usually only have one tour in the same tenured position. Continual rotation is not permitted except when no other qualified officers are available.

Selection for assignment as a military judge will be made by the Chief Trial Judge. Procedures for nominations will be as specified for nomination of MLC commanders. The nomination packet will be forwarded through the chain of command, through TJAGSA, (ATTN: JAGS–GRA) to the Chief Trial Judge (USALSA, ATTN: JALS–ZA, Nassif Building 5611, Columbia Pike, Falls Church, VA 22041–5013). Soldiers selected as military judges will be scheduled to attend the Military Judge Course. Military judges will be limited to a three year tenure (letter, DAJA–PT, Training, Employment, and Assignment Policy for Military Judge Teams (JAGSO Detachment Team KA) 23 Aug. 1985).

JAGSO team director assignments are made by selection of the Military Law Center commander in coordination with the CONUSA staff judge advocate. There are 112 team director positions and an additional 425 JAGC unit positions. Assignment to a JAGC position within the unit is made by the Military Law Center commander with concurrence of the ARCOM staff judge advocate.

Assignment of section leaders of a judge advocate staff section below the GOCOM level is made by the unit commander in coordination with the CONUSA SJA. There are 91 of these JA positions within the USAR. Selection for assignment to any one of the additional 102 non-section leader positions within these units is made by the section leader in coordination with the ARCOM or GOCOM Staff Judge Advocate and with the concurrence of the unit commander.

Assignment to JAGC Individual Mobilization Augmentee (IMA) positions can be accomplished by submitting a DA Form 2976–R, Application for IMA Program Assignment, to TJAGSA, ATTN: JAGS–GRA. Some IMA positions are nominative and your request, along with data profile information, are referred to the proponent agency for selection. Assignment to other JAGC IMA positions will be made based on your qualifications as related to the

requirements of the vacancy. If you have questions concerning IMA assignments, call LTC Gentry (1–800–654–5914, extension 380).

Assignment of JAGC officers to non-JAGC positions or non-JAGC officers to JAGC vacancies will be accomplished only after approval by the Commandant of TJAGSA (AR 140–10, paragraph 2–27).

Colonels and below may be assigned to unit position vacancies of the next lower grade, if approved by the CONUSA staff judge advocate. Approval may be granted for a period not to exceed one year when a qualified judge advocate of the appropriate grade is not available for assignment. Successive approvals may be granted if a qualified officer of the appropriate grade remains unavailable (letter, DAJA–ZA, Delegation of Authority to Approve Assignments, 3 Oct. 86).

Senior Reserve Judge Advocate Positions

U. S. Army Reserve Commands

ARCOM		SJA	Vacancy Due
	First Army		
77	Fort Totten, NY	COL F. D. Terrell	Jul 90
79	Willow Grove, PA	COL J. D. Campbell	Jul 89
94	Hanscom AFB, MA	COL P. L. Cummings	Apr 89
97	Fort Meade, MD	COL C. E. Brookhart	Nov 88
99	Oakdale, PA	COL A. B. Bowden	Sep 90
	Second Army		
81	East Point, GA	COL K. A. Nagle	Apr 90
120	Fort Jackson, SC	COL J. M. Cureton	Sep 89
121	Birmingham, AL	COL J. F. Wood, Jr.	Aug 89
125	Nashville, TN	COL J. B. Brown	Feb 91
	Fourth Army		
83	Columbus, OH	LTC D. A. Schulze	Sep 90
86	Forest Park, IL	COL M. R. Kos	Feb 91
88	Fort Snelling, MN	COL J. M. Mahoney	Oct 88
123	Indianapolis, IN	LTC J. F. Gatzke	Feb 89
	Fifth Army		
89	Wichita, KS	LTC D. J. Duffy	Apr 90
90	San Antonio, TX	COL G. M. Brown	Mar 89
102	St. Louis, MO	Vacant	
122	Little Rock, AR	COL B. W. Sanders	Feb 89
	Sixth Army		
63	Los Angeles, CA	COL A. C. Fork	Jan 90
96	Fort Douglas, UT	COL C. A. Jones	Aug 88
124	Fort Lawton, WA	COL J. L. Woodside	Mar 90

Military Law Centers

MLC		Commander	Vacancy Due
	First Army		
3	Boston, MA	COL P. S. Iuliano	Jul 88
4	Bronx, NY	COL C. E. Padgett	Apr 89
10	Washington, DC	COL R. G. Mahony	Sep 89
42	Pittsburgh, PA	COL J. A. Lynn	Aug 89
153	Willow Grove, PA	COL J. S. Ziccardi	Aug 89
	Second Army		
11	Jackson, MS	COL E. J. Phillips, Jr.	Jul 88
12	Columbia, SC	COL O. E. Powell, Jr.	Sep 89
139	Louisville, KY	Vacant	
174	Miami, FL	COL D. H. Bludworth	Jun 88
213	Chamblee, GA	COL K. A. Griffiths	Feb 90
	Fourth Army		
7	Chicago, IL	COL G. L. Vanderhoof	Feb 91
9	Columbus, OH	COL H. Ernst, Jr.	May 89
214	Ft Snelling, MN	COL L. W. Larson	Sep 88
	Fifth Army		
1	San Antonio, TX	COL J. M. Compere	Jun 89
2	New Orleans, LA	LTC J. C. Hawkins	Jan 90
8	Independence, MO	LTC D. E. Johnson	Nov 90
113	Wichita, KS	COL L. L. Taylor	Mar 89
114	Dallas, TX	COL C. J. Sebesta, Jr.	Mar 90
	Sixth Army		
5	Presidio of SF, CA	COL J. W. Cotchett	Jul 88
6	Seattle, WA	COL T. J. Kraft	Aug 89
78	Los Alamitos, CA	COL D. F. McIlroy	May 90
87	Ft Douglas, UT	COL M. J. Pezely	Sep 88

Training Divisions

TNG Div		SJA	Vacancy Due
	First Army		
76	West Hartford, CT	MAJ H. R. Cummings	Sep 90
78	Edison, NJ	LTC J. P. Halvorsen	Feb 90
80	Richmond, VA	LTC B. Miller III	Oct 88
98	Rochester, NY	LTC J. W. Dorn	May 90
	Second Army		
100	Louisville, KY	LTC L. R. Timmons	Mar 90
108	Charlotte, NC	LTC A. H. Scales	Dec 90
	Fourth Army		
70	Livonia, MI	LTC J. M. Wouczyna	Apr 89
84	Milwaukee, WI	LTC J. H. Olson	Nov 88
85	Chicago, IL	LTC T. Benshoof	Aug 90
	Fifth Army		
95	Midwest City, OK	LTC W. H. Sullivan	Aug 89
	Sixth Army		
91	Sausalito, CA	LTC R. A. Falco	Feb 89
104	Vancouver Barracks, WA	LTC D. C. Mitchell	Apr 89

General Officer Commands

GOCOMS	SJA	Vacancy Due
First Army		
352 CA CMD Riverdale, MD	Vacant	
353 CA CMD Bronx, NY	LTC R. R. Baldwin	Apr 90
300 SPT GP (AREA) Ft Lee, VA	Vacant	
310 TAACOM Ft Belvoir, VA	COL J. E. Ritchie	Mar 89
220 MP 3DE Gaithersburg, MD	Vacant	
Second Army		
412 ENGR CMD Vicksburg, MS	LTC W. M. Bost, Jr.	Jul 90
143 TRANS BDE Orlando, FL	LTC B. C. Starling	Jul 90
7561 USAG San Juan, PR	LTC E. A. Gonzalez	Sep 89
3D TRANS BDE Montgomery, AL	MAJ L. K. Mason	Aug 90
87th MAC Birmingham, AL	MAJ M. E. Sparkman	Oct 89
Fourth Army		
103 COSCOM Des Moines, IA	COL C. W. Larson	Jun 88
416 ENG CMD Chicago, IL	COL R. G. Bernoski	Apr 91
30 HOSP CTR (MOB TDA) Ft Sheridan, IL	MAJ J. F. Locallo, Jr.	Nov 88
300 MP CMD Inkster, MI	LTC P. A. Kirchner	May 91
425 TRANS BDE Ft Sheridan, IL	LTC S. K. Todd	Feb 89

Fifth Army		
75 MAN AREA CMD Houston, TX	LTC M. J. Thibodeaux	Jun 89
377 TAACOM New Orleans, LA	LTC K. P. Sills	Sep 90
420 ENGR BDE Bryan, TX	MAJ T. Podbielski	Sep 92
807 MED BDE Seagoville, TX	LTC R. Eastburn, Jr.	Sep 89
Sixth Army		
351 CA CMD Mountain View, CA	MAJ G. J. LaFave	Apr 90
311 COSCOM Los Angeles, CA	LTC J. C. Spence	Feb 89

The JAGC Warrant Officer Program USAR

Judge Advocate General's Corps warrant officers are specialists, trained in one highly technical field and placed repeatedly in assignments within that specialty. The legal administrator (550A) manages the overall administrative operations of a Military Law Center office or an International Law Team office. A complete job description for JAGC warrant officers can be found in AR 611–112.

Three Steps to Becoming a Warrant Officer

There are three steps to becoming a JAGC USAR warrant officer: meet prerequisites, apply, and be selected; complete the Warrant Officer Entry Course; and complete technical certification training.

a. Basic qualifications:

1. Be less than 46 years of age and able to complete 20 years of service by age 62;
2. Hold PMOS of 71D or 71E; and
3. Have a minimum of 5 years active or USAR service in MOS 71D or 71E (waiverable to 3 years).

b. Warrant Officer Entry Course:

1. Active resident course (6 weeks, 4 days) at Aberdeen Proving Grounds, MD; Fort Rucker, AL, or Fort Sill, OK; or
2. Army Reserve Readiness Training Center at Fort McCoy, WI (135 hour correspondence course phase followed by 2 weeks resident phase).

c. Technical certification:

(1) Completion of Legal Office Administrator Correspondence Course (184 hours);

(2) A legal administration course at proponent school (resident 1 week); and

(3) One week at a selected active duty SJA office for technical evaluation.

USAR JAGC Appointment Options

OPTION 1: Warrant Officer Entry Course and Candidacy Phase. A board at The Judge Advocate General's School (TJAGSA) reviews JAGC warrant officer applications to determine if they meet the basic qualifications and would be effective JAGC warrant officers. When the Commandant approves an individual, notification is provided to the Warrant Officer Entry Branch, Enlisted Personnel Management Directorate, ARPERCEN. WOEB manages the individual until appointment as a warrant officer. When the applicant arrives at the Warrant Officer Entry Course, the soldier becomes a warrant officer candidate and retains that status until the warrant is earned. At this point the candidate will be assigned to a TPU or IMA warrant officer position. Warrant officer candidates have their own distinctive uniform insignia which replace enlisted stripes and brass for the duration of the candidate training period. The training involves Phase I, the Warrant Officer Entry Course (WOEC), and Phase II, Technical Certification. When candidates have successfully completed technical certification, they are eligible to become warrant officers. TJAGSA is authorized to issue the appointment letter appointing the candidate as a warrant officer. When the individual returns the signed letter accepting the warrant, the packet will be forwarded to accessions division at ARPERCEN. AR 135–100 is the regulation governing reserve warrant officer appointments. NGR 600–101 provides guidance for appointment of ARNG warrant officers.

OPTION 2: Warrant Officer Entry Course and Conditional Appointment. A board at TJAGSA reviews JAG warrant officer applications to determine if they meet the basic qualifications and would be effective JAGC warrant officers. When the Commandant approves an individual, notification is provided to the Warrant Officer Entry Branch, Enlisted Personnel Management Directorate, ARPERCEN. WOEB manages the individual until appointed as a warrant officer. When the applicant arrives at the Warrant Officer Entry Course (WOEC) the soldier becomes a warrant officer candidate and retains that status until the warrant is earned. When The Judge Advocate General's School receives notification that the candidate has successfully completed the WOEC, the Commandant will tender a conditional appointment as a warrant officer. The appointment will be conditional upon completing technical certification within twenty-four months.

OPTION 3: Direct Appointment. Officers, warrant officers, former officers, and former warrant officers will be considered to have met the basic qualifications for appointment as a JAGC warrant officer and will not have to attend the Warrant Officer Entry Course. These individuals will have to undertake technical certification training unless the Commandant, TJAGSA, certifies that they are technically qualified for appointment as a warrant officer (550A).

Grade Determination

Warrant officer appointments will be as WOs, W–1. There are several exceptions to this rule. A Chief Warrant Officer (CWO) or a former CWO may be appointed in the highest WO grade satisfactorily held. Commissioned and former commissioned officers who have served a minimum of two years active service in a commissioned status may be appointed in the grade of CWO, W–2. Enlisted personnel serving in grades E–8 and E–9 may be appointed in the grade of CWO, W–2, provided they accept a six year service obligation, or in the grade of WO, W–1, and accept a four year service obligation.

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

April 4-8: 3rd Advanced Acquisition Course (5F-F17).

April 12-15: JA Reserve Component Workshop.

April 18-22: Law for Legal Noncommissioned Officers (512-71D/20/30).

April 18-22: 26th Fiscal Law Course (5F-F12).

April 25-29: 4th SJA Spouses' Course.

April 25-29: 18th Staff Judge Advocate Course (5F-F52).

May 2-13: 115th Contract Attorneys Course (5F-F10).

May 16-20: 33rd Federal Labor Relations Course (5F-F22).

May 23-27: 1st Advanced Installation Contracting Course (5F-F18).

May 23-June 10: 31st Military Judge Course (5F-F33).

June 6-10: 94th Senior Officers Legal Orientation Course (5F-F1).

June 13-24: JATT Team Training.

June 13-24: JAOAC (Phase VI).

June 27-July 1: U.S. Army Claims Service Training Seminar.

July 11-15: 39th Law of War Workshop (5F-F42).

July 11-13: Professional Recruiting Training Seminar.

July 12-15: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

July 18-29: 116th Contract Attorneys Course (5F-F10).

July 18-22: 17th Law Office Management Course (7A-713A).

July 25-September 30: 116th Basic Course (5-27-C20).

August 1-5: 95th Senior Officers Legal Orientation Course (5F-F1).

August 1-May 20, 1989: 37th Graduate Course (5-27-C22).

August 15-19: 12th Criminal Law New Developments Course (5F-F35).

September 12-16: 6th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. North Carolina Begins Mandatory CLE

North Carolina has become the twenty-ninth state to begin mandatory continuing legal education. Starting January 1, 1988, active attorneys must complete 12 hours of approved CLE each year. Members of the Armed Services on full-time active duty are exempt, but must declare their exemption. The reporting date is January 31 annually (except March 31 in 1989 only).

For further information, contact the North Carolina State Bar Board of Continuing Legal Education, 208 Fayetteville Street Mall, P.O. Box 25908, Raleigh, N.C. 27611, telephone (919) 733-0123.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	assigned monthly deadlines, every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar beginning in 1988
North Carolina	12 hours annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1988 issue of The Army Lawyer.

5. Civilian Sponsored CLE Courses

June 1988

1-3: PLI, Securities Enforcement/Securities Arbitration, New York, NY.

2: ABA, Marketing Legal Services (Satellite), 45 cities USA.

2-3: PLI, Leveraged Leasing, Los Angeles, CA.

2–3: PLI, Antitrust Law Institute, New York, NY.
2–3: PLI, Developing Export Trade, Los Angeles, CA.
2–3: PLI, Acquiring or Selling the Privately Held Company, Los Angeles, CA.
2–3: PLI, Securities Enforcement Institute, New York, NY.
2–3: PLI, Workshops for Legal Assistants, Chicago, IL.
2–3: BNA, Environment and Safety, Washington, D.C.
2–3: WTI, Legal and Tax Aspects of Compensating Foreign Nationals in the United States, New York, NY.
2–3: ALIABA, Securities Regulation of Thrifts, San Francisco, CA.
2–4: ALIABA, Commercial Real Estate Leasing, Chicago, IL.
2–10: NCDA, Executive Prosecutor Course, Houston, TX.
3: NKU, State and Federal Grand Jury Practice, Highland Heights, KY.
4–5: MLI, Psychological Disorders, Evaluation and Disability, Las Vegas, NV.
4–10: NITA, Mid-Atlantic Regional Trial Advisory Program, Philadelphia, PA.
6–7: PLI, Construction Contracts and Litigation, San Francisco, CA.
6–7: WTI, Customs Law Issues for Importers of Apparel and Textiles, New York, NY.
6–7: PLI, Hazardous Waste Litigation, Chicago, IL.
7–10: ESI, Procurement for Program, Technical, and Administrative Personnel, Lake Tahoe, NV.
9–10: BNA, EEO, Washington, D.C.
13: BNA, Smoking, Washington, D.C.
13–14: PLI, Current Developments in Copyright Law, New York, NY.
16–17: PLI, Hazardous Waste Litigation, New York, NY.
16–17: PLI, Institute on Employment Law, New York, NY.
16–7/1: NCDA, Career Prosecutor Course, Houston, TX.
17: PBI, Driving under the Influence, Altoona, PA.
17–18: PLI, Deposition Skills Training Program, New York, NY.
19–24: NJC, Sentencing Misdemeanants, Reno, NV.
20–21: PLI, Libel Litigation, New York, NY.
20–24: ALIABA, Estate Planning in Depth, Madison, WI.
21–23: SLF, Symposium on Private Investments Abroad, Dallas, TX.
23–24: PLI, Antitrust Law Institute, Chicago, IL.
24: PBI, Civil Litigation Update, Mercer, PA.
24: NKU, Law Office Management, Highland Heights, KY.
24–25: UKCL, Real Estate Law and Practice, Lexington, KY.
24–26: MLI, Orthopedic Injury and Disability, Boston, MA.
26–30: AAJE, Constitutional Criminal Procedure, Lexington, VA.
26–7/1: NITA, Advanced Trial Advocacy Program, Boulder, CO.
27–28: WTI, Legal and Tax Aspects of Foreign Investment in U.S. Real Property, New York, NY.
27–28: PLI, Acquiring or Selling the Privately Held Company, Chicago, IL.
29: PBI, Driving under the Influence, Kittanning, PA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1988 issue of *The Army Lawyer.*

Current Material of Interest

1. ABA Seeks Outstanding Young Military Service Lawyers

The Military Service Lawyers Committee of the Young Lawyers Division of the ABA is accepting nominations for the "Outstanding Young Military Service Lawyer" in each of the uniformed services for 1987–88. Nominations will be evaluated by a panel of distinguished retired judge advocates for: demonstrated excellence in the delivery of legal services; proven leadership ability; consistently outstanding performance of all assigned duties; demonstrated scholarship; and service to the community.

Nominees must be under age 36 as of 1 July 1987, and are not required to be ABA members. Nominations, which may be submitted by any licensed attorney, must include a detailed description of the nominee's qualifications and may include supporting documentation. Forwarding endorsements by military superiors that do not add new information concerning the nominee's qualifications are discouraged. The entire nomination package should not exceed 10 pages. Three copies of the package should be mailed directly to: Captain Robert C. Barber, Chairperson, ABA/YLD Military Service Lawyers Committee, 6419 English Ivy Way, Springfield, VA 22152.

All nominations must be postmarked no later than 31 May 1988. The awards will be announced and the recipients honored at the ABA annual meeting in Toronto, Canada, 4–7 August 1988.

2. TJAGSA Publications Available Through Defense Technical Information Center

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).

AD B100234 Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211 Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD B116100 Legal Assistance Consumer Law Guide/ JAGS–ADA–87–13 (614 pgs).
AD B116101 Legal Assistance Wills Guide/ JAGS–ADA–87–12 (339 pgs).
AD B116102 Legal Assistance Office Administration Guide/JAGS–ADA–87–11 (249 pps).
AD B116097 Legal Assistance Real Property Guide/ JAGS–ADA–87–14 (414 pgs).
AD A174549 All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092 All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771 All States Law Summary, Vol I/ JAGS–ADA–87–5 (467 pgs).
AD B094235 All States Law Summary, Vol II/ JAGS–ADA–87–6 (417 pgs).
AD B114054 All States Law Summary, Vol III/ JAGS–ADA–87–7 (450 pgs).
AD B090988 Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989 Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128 USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857 Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).
AD B116103 Legal Assistance Preventive Law Series/ JAGS–ADA–87–10 (205 pgs).
AD B116099 Legal Assistance Tax Information Series/ JAGS–ADA–87–9 (121 pgs).

Claims

AD B108054 Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849 AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848 Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235 Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251 Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B108016 Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).
AD B107990 Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).
AD B100675 Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846 Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204 Uniform System of Military Citation/ JAGS–DD–84–1 (38 pgs.)

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212 Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 10–73	The Judge Advocate General's School	I01	29 Feb 88
AR 30–1	Army Food Service Program		1 Jan 88
AR 37–103	Disbursing Operations for Finance and Accounting Offices		4 Dec 87
AR 190–6	Obtaining Information from Financial Institutions	I01	16 Dec 87
AR 190–11	Army Physical Security Program	I01	15 Jan 88
AR 310–10	Military Orders		23 Dec 87
AR 525–13	Army Terrorism Counter-Action Program		4 Jan 88
AR 601–280	Army Reenlistment Program (FORSCOM Supp)		1 Nov 87
AR 710–3	Asset and Transaction Reporting System		16 Dec 87
Cir 11–87–5	Internal Control Review Checklists		15 Dec 87
Cir 11–87–7	Management Control Plan		31 Dec 87
DA Pam 11–7	Requirement Objective Code (ROBCO) Program		4 Dec 87
DA Pam 27–26	Rules of Professional Conduct for Lawyers		Dec 87
DA Pam 37–2	Time and Attendance Reporting for the Standard Army Civilian Payroll System (STAR-CAPS)		6 Jan 88
DA Pam 165–16	Moral Leadership/ Values—Stages of Family Life Cycle		30 Oct 87
DA Pam 350–22	You and the APFT		15 Sep 87
DA Pam 360–503	88–89 Voting Assistance Guide		No date

DA Pam 608–47	Guide to Establishing Family Support Groups		4 Jan 88
DA Pam 621–200	Army Apprenticeship Program Procedural Guidance		18 Dec 87
DA Pam 623–205	Noncommissioned Officer Evaluation Reporting System "In Brief"		Jan 88
DA Pam 738–751	Functional Users Manual for the Army Maintenance Management System—Aviation (TAMMS–A)		15 Jan 88
JFTR Vol. 1	Joint Federal Travel Regulations	13	1 Jan 88
JFTR Vol. 2	Joint Federal Travel Regulations	267	1 Jan 88
UPDATE 5	Personnel Evaluations		1 Feb 88
UPDATE 11	Unit Supply Update		13 Jan 88
UPDATE 13	Enlisted Ranks Personnel		22 Jan 88

4. Articles

The following civilian law review articles may be of some use to judge advocates in performing their duties.

Durham, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. Crim. L. & Criminology 614 (1987).

Hennis, *Satisfying Punitive Damage Awards From an Individual's Separate Property, Community Property, or Both*, Community Prop. J., Jan. 1988, at 68.

Hutton, *Child Sexual Abuse Cases: Reestablishing the Balance within the Adversary System*, 20 U. Mich. J.L. Ref. 491 (1987).

Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 Cin. L. Rev. 1 (1987).

Nagel, *Computer-Aided Law Decisions*, 21 Akron L. Rev. 73 (1987).

Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. Rev. 231.

Piette, *Law Office Automation: Pitfalls and Opportunities*, 28 Law Off. Econ. & Mgmt. 280 (1987).

Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 Tul. L. Rev. 109 (1987).

Scheingold & Gressett, *Policy, Politics, and the Criminal Courts*, 1987 Am B. Found. Res J. 461.

Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 St. Mary's L.J. 35 (1987).

Simmons, *Is it Really Reform? A Theoretical Overview of the 1986 Tax Reform Act*, 1987 B.Y.U. L. Rev. 151.

Suplee & Woodruff, *Direct Examination of Experts*, Prac. Law., Dec. 1987, at 53.

Symposium: State Sponsored International Terrorism, 20 Vand. J. Transnat'l L. 195 (1987).

Comment, *Service Member Recovery for Military Medical Malpractice Under the Federal Tort Claims Act: A Judicial Response*, 19 St. Mary's L.J. 203 (1987).

Note, *The "Core"—"Periphery" Dichotomy in First Amendment Free Exercise Clause Doctrine:* Goldman v. Weinberger, Bowen v. Roy, *and* O'Lone v. Estate of Shabazz, 72 Cornell L. Rev. 827 (1987).

Note, *A Proposal for Mandatory Drug Testing of Federal Civilian Employees*, 62 N.Y.U. L. Rev. 322 (1987).

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